

Subpart 224.2—Freedom of Information Act

224.203 Policy.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36367, July 31, 1991, unless otherwise noted.

Subpart 224.1—Protection of Individual Privacy

224.103 Procedures.

(b)(2) DoD rules and regulations are contained in DoDD 5400.11, Department of Defense Privacy Program, and DoD 5400.11-R, Department of Defense Privacy Program.

Subpart 224.2—Freedom of Information Act

224.203 Policy.

(a) DoD implementation is in DoDD 5400.7, DoD Freedom of Information Act Program, and DoD 5400.7-R, DoD Freedom of Information Act Program.

[56 FR 36367, July 31, 1991. Redesignated at 62 FR 34122, June 24, 1997]

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36367, July 31, 1991, unless otherwise noted.

225.001 General.

For guidance on evaluating offers of foreign end products, see PGI 225.001.

[70 FR 73154, Dec. 9, 2005]

225.003 Definitions.

As used in this part—

(1) *Caribbean Basin country end product* includes petroleum or any product derived from petroleum.

(2) *Defense equipment* means any equipment, item of supply, component, or end product purchased by DoD.

(3) *Domestic concern* means—

(i) A concern incorporated in the United States (including a subsidiary that is incorporated in the United States, even if the parent corporation is a foreign concern; or

(ii) An unincorporated concern having its principal place of business in the United States.

(4) *Domestic end product* has the meaning given in the clauses at 252.225-7001, Buy American Act and Balance of Payments Program; and 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, instead of the meaning in FAR 25.003.

(5) *Eligible product* means, instead of the definition in FAR 25.003—

(i) A foreign end product that—

(A) Is in a category listed in 225.401-70; and

(B) Is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition;

(ii) A foreign construction material that is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition; or

(iii) A foreign service that is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition.

(6) *Foreign concern* means any concern other than a domestic concern.

(7) *Free Trade Agreement country* does not include Oman.

(8) *Nonqualifying country* means a country other than the United States or a qualifying country.

(9) *Nonqualifying country component* means a component mined, produced, or manufactured in a nonqualifying country.

(10) *Qualifying country* means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457. Accordingly, the following are qualifying countries:

Australia
Austria
Belgium
Canada
Denmark
Egypt
Finland
France
Germany
Greece
Israel
Italy
Luxembourg
Netherlands
Norway
Portugal
Spain
Sweden
Switzerland
Turkey
United Kingdom of Great Britain and Northern Ireland.

(11) *Qualifying country component* and *qualifying country end product* are de-

fined in the clauses at 252.225–7001, Buy American Act and Balance of Payments Program; and 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program. *Qualifying country end product* is also defined in the clause at 252.225–7021, Trade Agreements.

(12) *Qualifying country offer* means an offer of a qualifying country end product, including the price of transportation to destination.

(13) *Source*, when restricted by words such as foreign, domestic, or qualifying country, means the actual manufacturer or producer of the end product or component.

(14) *South Caucasus/Central and South Asian (SC/CASA) state* means Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, or Uzbekistan.

(15) *South Caucasus/Central and South Asian (SC/CASA) state construction material* means construction material that—

(i) Is wholly the growth, product, or manufacture of an SC/CASA state; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in an SC/CASA state into a new and different construction material distinct from the material from which it was transformed.

(16) *South Caucasus/Central and South Asian (SC/CASA) state end product* means an article that—

(i) Is wholly the growth, product, or manufacture of an SC/CASA state; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an SC/CASA state into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does

not exceed the value of the product itself.

[68 FR 15618, Mar. 31, 2003, as amended at 69 FR 1927, Jan. 13, 2004; 70 FR 73153, Dec. 9, 2005; 73 FR 76971, Dec. 18, 2008; 74 FR 37651, July 29, 2009; 75 FR 34945, June 21, 2010; 75 FR 81916, Dec. 29, 2010]

225.004 Reporting of acquisition of end products manufactured outside the United States.

Follow the procedures at PGI 225.004 for entering the data upon which the report required by FAR 25.004 will be based.

[71 FR 62559, Oct. 26, 2006]

Subpart 225.1—Buy American Act—Supplies

SOURCE: 68 FR 15618, Mar. 31, 2003, unless otherwise noted.

225.101 General.

(a) For DoD, the following two-part test determines whether a manufactured end product is a domestic end product:

(i) The end product is manufactured in the United States; and

(ii) The cost of its U.S. and qualifying country components exceeds 50 percent of the cost of all its components. This test is applied to end products only and not to individual components.

(c) Additional exceptions that allow the purchase of foreign end products are listed at 225.103.

225.103 Exceptions.

(a)(i)(A) Public interest exceptions for certain countries are in 225.872.

(B) For procurements covered by the World Trade Organization Government Procurement Agreement, the Under Secretary of Defense (Acquisition, Technology, and Logistics) has determined that it is inconsistent with the public interest to apply the Buy American Act to end products that are substantially transformed in the United States.

(ii)(A) Normally, use the evaluation procedures in Subpart 225.5, but consider recommending a public interest exception if the purposes of the Buy American Act are not served, or in

order to meet a need set forth in 10 U.S.C. 2533. For example, a public interest exception may be appropriate—

(1) If accepting the low domestic offer will involve substantial foreign expenditures, or accepting the low foreign offer will involve substantial domestic expenditures;

(2) To ensure access to advanced state-of-the-art commercial technology; or

(3) To maintain the same source of supply for spare and replacement parts (also see paragraph (b)(iii)(B) of this section)—

(i) For an end item that qualifies as a domestic end product; or

(ii) In order not to impair integration of the military and commercial industrial base.

(B) Except as provided in PGI 225.872–4, process a determination for a public interest exception after consideration of the factors in 10 U.S.C. 2533—

(1) At a level above the contracting officer for acquisitions valued at or below the simplified acquisition threshold;

(2) By the head of the contracting activity for acquisitions with a value greater than the simplified acquisition threshold but less than \$1.5 million; or

(3) By the agency head for acquisitions valued at \$1.5 million or more.

(b)(i) A determination that an article, material, or supply is not reasonably available is required when domestic offers are insufficient to meet the requirement and award is to be made on other than a qualifying country or eligible end product.

(ii) Except as provided in FAR 25.103(b)(3), the determination shall be approved—

(A) At a level above the contracting officer for acquisitions valued at or below the simplified acquisition threshold;

(B) By the chief of the contracting office for acquisitions with a value greater than the simplified acquisition threshold but less than \$1.5 million; or

(C) By the head of the contracting activity or immediate deputy for acquisitions valued at \$1.5 million or more.

(iii) A separate determination as to whether an article is reasonably available is not required for the following articles. DoD has already determined

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that these articles are not reasonably available from domestic sources:

(A) End products or components listed in 225.104(a).

(B) Spare or replacement parts that must be acquired from the original foreign manufacturer or supplier.

(C) Foreign drugs acquired by the Defense Supply Center, Philadelphia, when the Director, Pharmaceuticals Group, Directorate of Medical Materiel, determines that only the requested foreign drug will fulfill the requirements.

(iv) Under coordinated acquisition (see Subpart 208.70), the determination is the responsibility of the requiring department when the requiring department specifies acquisition of a foreign end product.

(c) The cost of a domestic end product is unreasonable if it is not the low evaluated offer when evaluated under Subpart 225.5.

[68 FR 15618, Mar. 31, 2003, as amended at 70 FR 2362, Jan. 13, 2005; 73 FR 4113, Jan. 24, 2008; 75 FR 45074, Aug. 2, 2010]

225.104 Nonavailable articles.

(a) DoD has determined that the following articles also are nonavailable in accordance with FAR 25.103(b):

- (i) Aluminum clad steel wire.
- (ii) Sperm oil.

225.105 Determining reasonableness of cost.

(b) Use an evaluation factor of 50 percent instead of the factors specified in FAR 25.105(b).

225.170 Acquisition from or through other Government agencies.

Contracting activities must apply the evaluation procedures in Subpart 225.5 when using Federal supply schedules.

Subpart 225.2—Buy American Act—Construction Materials

225.202 Exceptions.

(a)(2) A nonavailability determination is not required for construction materials listed in FAR 25.104(a) or in 225.104(a). For other materials, a nonavailability determination shall be approved at the levels specified in 225.103(b)(ii). Use the estimated value

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of the construction materials to determine the approval level.

[65 FR 19851, Apr. 13, 2000, as amended at 68 FR 15619, Mar. 31, 2003]

225.206 Noncompliance.

(c)(4) Prepare any report of noncompliance in accordance with the procedures at 209.406–3 or 209.407–3.

[64 FR 62986, Nov. 18, 1999]

Subpart 225.3—Contracts Performed Outside the United States

SOURCE: 73 FR 16774, Mar. 31, 2008, unless otherwise noted.

225.301 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.

225.301–1 Scope.

(a) *Performance in a designated operational area*, as used in this section, means performance of a service or construction, as required by the contract. For supply contracts, the term includes services associated with the acquisition of supplies (e.g., installation or maintenance), but does not include production of the supplies or associated overhead functions.

(c) For DoD, this section also applies to all personal services contracts.

225.301–4 Contract clause.

(1) Use the clause at FAR 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, in accordance with the prescription at FAR 25.301–4, except that—

(i) The clause shall also be used in personal services contracts with individuals; and

(ii) The clause shall not be used when all contractor personnel performing outside the United States will be covered by the clause at 252.225–7040.

(2) When using the clause at FAR 52.225–19, the contracting officer shall inform the contractor that the Synchronized Predeployment and Operational Tracker (SPOT) is the appropriate automated system to use for the

list of contractor personnel required by paragraph (g) of the clause. Information on the SPOT system is available at <http://www.dod.mil/bta/products/spot.html> and <http://www.acq.osd.mil/log/PS/spot.html>.

[73 FR 16774, Mar. 31, 2008, as amended at 74 FR 34265, July 15, 2009]

225.370 Contractors performing private security functions.

225.370-1 Scope.

This section prescribes policy for implementing section 862 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181), as amended by section 853 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) and sections 831 and 832 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383).

225.370-2 Applicability.

This section applies to acquisitions for supplies and services that require the performance of private security functions in areas of—

- (a) Contingency operations (see FAR 2.101);
- (b) Complex contingency operations; or
- (c) Other military operations or exercises that are designated by the combatant commander.

225.370-3 Definitions.

As used in this section—

Complex contingency operations means large-scale peace operations (or elements thereof) conducted by a combination of military forces and non-military organizations that involve one or more of the elements of peace operations that include one or more elements of other types of operations, such as foreign humanitarian assistance, nation assistance, support to insurgency, or support to counterinsurgency.

Private security functions means activities engaged in by a contractor, including—

- (1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party; and

- (2) Any other activity for which personnel are required to carry weapons in the performance of their duties.

225.370-4 Policy.

(a) The policy, responsibilities, procedures, accountability, training, equipping, and conduct of personnel performing private security functions in designated areas are addressed in Department of Defense Instruction (DoDI) 3020.50, Private Security Contractors Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations, at <http://www.dtic.mil/whs/directives/correspdf/302050p.pdf>.

(b) The requirements of this section apply to contractors that employ private security contractors in areas of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander, whether the contract is for the performance of private security functions or other supplies or services.

(c) DoD requires contractors described in paragraph (b) above to—

- (1) Ensure that all employees of the contractor who are responsible for performing private security functions comply with orders, directives, and instructions to contractors performing private security functions for—

- (i) Registering, processing, accounting for, managing, overseeing, and keeping appropriate records of personnel performing private security functions. This includes ensuring the issuance, maintenance, and return of Personal Identity Verification credentials in accordance with FAR clause 52.204-9, Personal Identity Verification of Contractor Personnel, and DoD procedures, including revocation of any physical and/or logistical access (as defined by Homeland Security Presidential Directive (HSPD-12)) granted to such personnel;

- (ii) Authorizing and accounting for weapons to be carried by or available to be used by personnel performing private security functions;

(A) All weapons must be registered in the Synchronized Predeployment Operational Tracker (SPOT) materiel tracking system.

(B) In addition, all weapons that are Government-furnished property must be assigned a unique identifier in accordance with the clauses at 252.211-7003 and 252.245.7001 and physically marked in accordance with MIL-STD 130 (current version) and DoD directives and instructions. The items must be registered in the DoD Item Unique Identification (IUID) Registry (<https://www.bpn.gov/iuid/>);

(iii) Registering and identifying armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions;

(A) All armored vehicles, helicopters, and other military vehicles must be registered in SPOT.

(B) In addition, all armored vehicles, helicopters, and other military vehicles that are Government-furnished property must be assigned a unique identifier in accordance with the clauses at 252.211-7003 and 252.245.7001 and physically marked in accordance with MIL-STD 130 (current version) and DoD directives and instructions. The items must be registered in the DoD IUID Registry; and

(iv) Reporting incidents in which—

(A) A weapon is discharged by personnel performing private security functions;

(B) Personnel performing private security functions are attacked, killed, or injured;

(C) Persons are killed or injured or property is destroyed as a result of conduct by contractor personnel;

(D) A weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(E) Active, non-lethal countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat;

(2) Ensure that all employees of the contractor who are responsible for personnel performing private security functions are briefed on and understand their obligation to comply with—

(i) Qualification, training, screening (including, if applicable, thorough

background checks), and security requirements established by DoDI 3020.50;

(ii) Applicable laws and regulations of the United States and the host country and applicable treaties and international agreements regarding performance of the functions of the private security contractors;

(iii) Orders, directives, and instructions issued by the applicable commander of a combatant command relating to weapons, equipment, force protection, security, health, safety, or relations and interaction with locals; and

(iv) Rules on the use of force issued by the applicable commander of a combatant command for personnel performing private security functions; and

(3) Cooperate with any Government-authorized investigation by providing access to employees performing private security functions and relevant information in the possession of the contractor.

225.370-5 Remedies.

(a) In addition to other remedies available to the Government—

(1) The contracting officer may direct the contractor, at its own expense, to remove and replace any contractor personnel who fail to comply with or violate applicable requirements. Such action may be taken at the Government's discretion without prejudice to its rights under any other contract provision, including termination for default. Required contractor actions include—

(i) Ensuring the return of personal identity verification credentials;

(ii) Ensuring the return of any other equipment issued to the employee under the contract; and

(iii) Revocation of any physical and/or logistical access granted to such personnel;

(2) The contracting officer shall include the contractor's failure to comply with the requirements of this subpart in appropriate databases of past performance and consider any such failure in any responsibility determination or evaluation of past performance;

(3) In the case of award-fee contracts, the contracting officer shall consider a contractor's failure to comply with the

requirements of this subpart in the evaluation of the contractor's performance during the relevant evaluation period, and may treat such failure as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period; and

(4) If the contractor fails to comply with the Government's direction to remove or replace personnel (see paragraph (a)(1) of this subsection), and such failure to comply is severe, prolonged, or repeated, the contracting officer may terminate the contract for default.

(b) If the performance failures are significant or repeated, the contracting officer shall refer the contractor to the appropriate suspension and debarment official.

225.370-6 Contract clause.

Use the clause at 252.225-7039, Contractors Performing Private Security Functions, in all solicitations and contracts to be performed in areas of—

- (a) Contingency operations;
- (b) Complex contingency operations; or
- (c) Other military operations or exercises, when designated by the combatant commander.

Subpart 225.4—Trade Agreements

SOURCE: 65 FR 19852, Apr. 13, 2000, unless otherwise noted.

225.401 Exceptions.

(a)(2)(A) If a department or agency considers an individual acquisition of a product to be indispensable for national security or national defense purposes and appropriate for exclusion from the provisions of FAR subpart 25.4, it may submit a request with supporting rationale to the Director of Defense Procurement and Acquisition Policy (OUSD(AT&L)DPAP). Approval by OUSD(AT&L)DPAP is not required if—

- (1) Purchase from foreign sources is restricted by statute (see subpart 225.70);
- (2) Another exception in FAR 25.401 applies to the acquisition; or
- (3) Competition from foreign sources is restricted under subpart 225.71.

(B) Public interest exceptions for certain countries when acquiring products or services in support of operations in Afghanistan are in 225.7704-1.

[75 FR 81916, Dec. 29, 2010]

225.401-70 End products subject to trade agreements.

Acquisitions of end products in the following Federal supply groups (FSG) are covered by trade agreements if the value of the acquisition is at or above the applicable trade agreement threshold and no exception applies. If an end product is not in one of the listed groups, the trade agreements do not apply. The definition of Caribbean Basin country end products in FAR 25.003 excludes those end products that are not eligible for duty-free treatment under 19 U.S.C. 2703(b). Therefore certain watches, watch parts, and luggage from certain Caribbean Basin countries are not eligible products. However, 225.003 expands the definition of Caribbean Basin country end products to include petroleum and any product derived from petroleum, in accordance with Section 8094 of Pub. L. 103-139.

FSG	Category/Description
22	Railway equipment
23	Motor vehicles, trailers, and cycles (except 2350 and buses under 2310)
24	Tractors
25	Vehicular equipment components
26	Tires and tubes
29	Engine accessories
30	Mechanical power transmission equipment
32	Woodworking machinery and equipment
34	Metalworking machinery
35	Service and trade equipment
36	Special industry machinery (except 3690)
37	Agricultural machinery and equipment
38	Construction, mining, excavating, and highway maintenance equipment
39	Materials handling equipment
40	Rope, cable, chain and fittings
41	Refrigeration and air conditioning equipment
42	Fire fighting, rescue and safety equipment
43	Pumps and compressors
44	Furnace, steam plant and drying equipment (except 4470)
45	Plumbing, heating, and sanitation equipment

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FSG	Category/Description
46	Water purification and sewage treatment equipment
47	Piping, tubing, hose, and fitting
48	Valves
49	Maintenance and repair shop equipment (except 4920-4927, 4931-4935, 4960)
53	Hardware and abrasives
54	Prefabricated structures and scaffolding
55	Lumber, millwork, plywood, and veneer
56	Construction and building materials
61	Electric wire, and power and distribution equipment
62	Lighting fixtures and lamps
63	Alarm and signal systems
65	Medical, dental, and veterinary equipment and supplies
66	Instruments and laboratory equipment (except aircraft clocks under 6645)—See FAR 25.003 exclusion of certain watches and watch parts for certain Caribbean Basin countries
67	Photographic equipment
68	Chemicals and chemical products
69	Training aids and devices
70	General purpose ADPE, software, supplies, and support equipment
71	Furniture
72	Household and commercial furnishings and appliances
73	Food preparation and serving equipment
74	Office machines, visible record equipment and ADP equipment
75	Office supplies and devices
76	Books, maps, and other publications
77	Musical instruments, phonographs, and home type radios
78	Recreational and athletic equipment
79	Cleaning equipment and supplies
80	Brushes, paints, sealers, and adhesives
81	Containers, packaging and packing supplies (except 8140)
83	Pins, needles, and sewing kits (only part of 8315) and flag staffs, flagpoles, and flagstaff trucks (only part of 8345)
84	Luggage (only 8460)—See FAR 25.003 for exclusion of luggage for Caribbean Basin countries
85	Toiletries
87	Agricultural supplies
88	Live animals
89	Tobacco products (only 8975)
91	Fuels, oils, and waxes
93	Nonmetallic fabricated materials
94	Nonmetallic crude materials
96	Ores, minerals, and their primary products
99	Miscellaneous

[65 FR 19852, Apr. 13, 2000, as amended at 68 FR 15619, Mar. 31, 2003; 69 FR 1927, Jan. 13, 2004; 70 FR 2363, Jan. 13, 2005; 70 FR 73154, Dec. 9, 2005; 71 FR 9270, Feb. 23, 2006]

225.401-71 Products or services in support of operations in Iraq or Afghanistan.

When acquiring products or services, other than small arms, in support of operations in Iraq or Afghanistan—

(a) If using the procedure specified in 225.7703-1(a)(1), the purchase restriction at FAR 25.403(c) does not apply with regard to products or services from Iraq.

(b) If using a procedure specified in 225.7703-1(a)(2) or (3), the procedures of subpart 25.4 are not applicable.

[75 FR 18039, Apr. 8, 2010]

225.402 General.

To estimate the value of the acquisition, use the total estimated value of end products covered by trade agreements (*see* 225.401-70).

[70 FR 2363, Jan. 13, 2005]

225.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.

(c) For acquisitions of supplies covered by the World Trade Organization Government Procurement Agreement, acquire only U.S.-made, qualifying country, or designated country end products unless—

(i) The contracting officer determines that offers of U.S.-made, qualifying country, or designated country end products from responsive, responsible offerors are either—

(A) Not received; or

(B) Insufficient to fill the Government's requirements. In this case, accept all responsive, responsible offers of U.S.-made, qualifying country, and eligible products before accepting any other offers; or

(ii) A national interest waiver under 19 U.S.C. 2512(b)(2) is granted on a case-by-case basis. Except as delegated in paragraphs (c)(i)(A) and (B) of this section, submit any request for a national interest waiver to the Director of Defense Procurement and Acquisition Policy in accordance with department or agency procedures. Include supporting rationale with the request.

(A) The head of the contracting activity may approve a national interest waiver for a purchase by an overseas purchasing activity, if the waiver is supported by a written statement from the requiring activity that the products being acquired are critical for the support of U.S. forces stationed abroad.

(B) The Commander or Director, Defense Energy Support Center, may approve national interest waivers for purchases of fuel for use by U.S. forces overseas.

(iii) The acquisition is in support of operations in Afghanistan (see 225.7704-1).

[68 FR 15619, Mar. 31, 2003, as amended at 70 FR 2363, Jan. 13, 2005; 75 FR 81916, Dec. 29, 2010]

225.408 Procedures.

(a)(4) The requirements of FAR 25.408(a)(4), on submission of offers in U.S. dollars, do not apply to overseas acquisitions or to Defense Energy Support Center post, camp, or station overseas requirements.

[70 FR 73154, Dec. 9, 2005]

Subpart 225.5—Evaluating Foreign Offers—Supply Contracts

SOURCE: 68 FR 15620, Mar. 31, 2003, unless otherwise noted.

225.502 Application.

(a) Whenever the acquisition is in support of operations in Afghanistan, treat the offers of end products from South Caucasus or Central and South Asian states listed in 225.401-70 the same as qualifying country offers.

(b) Use the following procedures instead of the procedures in FAR 25.502(b) for acquisitions subject to the World Trade Organization Government Procurement Agreement:

(i) Consider only offers of U.S.-made, qualifying country, or designated country end products, except as permitted by 225.403 or 225.7703-1.

(ii) If price is the determining factor, award on the low offer.

(c) Use the following procedures instead of those in FAR 25.502(c) for acquisitions subject to the Buy American Act or the Balance of Payments Program:

(i)(A) If the acquisition is subject only to the Buy American Act or the Balance of Payments Program, then only qualifying country end products are exempt from application of the Buy American Act or Balance of Payments Program evaluation factor.

(B) If the acquisition is also subject to a Free Trade Agreement, then eligible products of the applicable Free Trade Agreement country are also exempt from application of the Buy American Act or Balance of Payments Program evaluation factor.

(ii) If price is the determining factor, use the following procedures:

(A) If the low offer is a domestic offer, award on that offer.

(B) If there are no domestic offers, award on the low offer (see example in 225.504(1)).

(C) If the low offer is a foreign offer that is exempt from application of the Buy American Act or Balance of Payments Program evaluation factor, award on that offer. (If the low offer is a qualifying country offer from a country listed at 225.872-1(b), execute a determination in accordance with 225.872-4.)

(D) If the low offer is a foreign offer that is not exempt from application of the Buy American Act or Balance of Payments Program evaluation factor, and there is another foreign offer that is exempt and is lower than the lowest domestic offer, award on the low foreign offer (see example in 225.504(2)).

(E) Otherwise, apply the 50 percent evaluation factor to the low foreign offer.

(1) If the price of the low domestic offer is less than the evaluated price of the low foreign offer, award on the low domestic offer (see example in 225.504(3)).

(2) If the evaluated price of the low foreign offer remains less than the low domestic offer, award on the low foreign offer (see example in 225.504(4)).

(iii) If price is not the determining factor, use the following procedures:

(A) If there are domestic offers, apply the 50 percent Buy American Act or Balance of Payments Program evaluation factor to all foreign offers unless an exemption applies.

(B) Evaluate in accordance with the criteria of the solicitation.

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(C) If these procedures will not result in award on a domestic offer, reevaluate offers without the 50 percent factor. If this will result in award on an offer to which the Buy American Act or Balance of Payments Program applies, but evaluation in accordance with paragraph (c)(ii) of this section would result in award on a domestic offer, proceed with award only after execution of a determination in accordance with 225.103(a)(ii)(B), that domestic preference would be inconsistent with the public interest.

(iv) If the solicitation includes the provision at 252.225-7023, Preference for Products or Services from Iraq or Afghanistan, use the evaluation procedures at 225.7703-3.

[68 FR 15620, Mar. 31, 2003, as amended at 69 FR 1928, Jan. 13, 2004; 69 FR 74992, Dec. 15, 2004; 70 FR 2363, Jan. 13, 2005; 73 FR 53152, Sept. 15, 2008; 75 FR 81916, Dec. 29, 2010]

225.503 Group offers.

Evaluate group offers in accordance with FAR 25.503, but apply the evaluation procedures of 225.502.

225.504 Evaluation examples.

For examples that illustrate the evaluation procedures in 225.502(c)(ii), see PGI 225.504.

[70 FR 73154, Dec. 9, 2005]

Subpart 225.7—Prohibited Sources

225.701 Restrictions.

See 209.104-1(g) for restrictions on contracting with firms owned or controlled by foreign governments.

[70 FR 73154, Dec. 9, 2005]

225.701-70 Exception.

DoD personnel are authorized to make emergency acquisitions in direct support of U.S. or allied forces deployed in military contingency, humanitarian, or peacekeeping operations in a country or region subject to economic sanctions administered by the Department of the Treasury, Office of Foreign Assets Control.

[68 FR 7441, Feb. 14, 2003]

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225.770 Prohibition on acquisition of United States Munitions List items from Communist Chinese military companies.

This section implements Section 1211 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109-163). See PGI 225.770 for additional information relating to this statute, the terms used in this section, and the United States Munitions List.

[71 FR 53046, Sept. 8, 2006]

225.770-1 Definitions.

As used in this section—

(a) *Communist Chinese military company* and *United States Munitions List* are defined in the clause at 252.225-7007, Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies.

(b) *Component* means an item that is useful only when used in conjunction with an end item (22 CFR 121.8).

(c) *Part* means any single unassembled element of a major or minor component, accessory, or attachment, that is not normally subject to disassembly without the destruction or impairment of design use (22 CFR 121.8).

[71 FR 53046, Sept. 8, 2006]

225.770-2 Prohibition.

Do not acquire supplies or services covered by the United States Munitions List (USML) (22 CFR part 121), through a contract or subcontract at any tier, from any Communist Chinese military company. This prohibition does not apply to components and parts of covered items unless the components and parts are themselves covered by the USML.

[71 FR 53046, Sept. 8, 2006]

225.770-3 Exceptions.

The prohibition in 225.770-2 does not apply to supplies or services acquired—

(a) In connection with a visit to the People's Republic of China by a vessel or an aircraft of the U.S. armed forces;

(b) For testing purposes; or

(c) For the purpose of gathering intelligence.

[71 FR 53046, Sept. 8, 2006]

225.770-4 Identifying USML items.

(a) Before issuance of a solicitation, the requiring activity shall notify the contracting officer in writing whether the items to be acquired are covered by the USML. The notification shall identify any covered item(s) and shall provide the pertinent USML reference(s) from 22 CFR Part 121.

(b) The USML includes defense articles and defense services that fall into 21 categories. Since not all USML items are themselves munitions (*e.g.*, protective personnel equipment, military training equipment), the requiring activity should consult the USML before concluding that an item is or is not covered by the USML.

[71 FR 53046, Sept. 8, 2006]

225.770-5 Waiver of prohibition.

(a) The prohibition in 225.770-2 may be waived, on a case-by-case basis, if an official identified in paragraph (b) of this subsection determines that a waiver is necessary for national security purposes.

(b) The following officials are authorized, without power of delegation, to make the determination specified in paragraph (a) of this subsection:

(1) The Under Secretary of Defense (Acquisition, Technology, and Logistics).

(2) The Secretaries of the military departments.

(3) The Component Acquisition Executive of the Defense Logistics Agency.

(c) The official granting a waiver shall notify the congressional defense committees within 30 days after the date of the waiver.

[71 FR 53046, Sept. 8, 2006]

Subpart 225.8—Other International Agreements and Coordination

SOURCE: 68 FR 15621, Mar. 31, 2003, unless otherwise noted.

225.802 Procedures.

(b) Information on memoranda of understanding and other international agreements is available at PGI 225.802(b).

[70 FR 73154, Dec. 9, 2005]

225.802-70 Contracts for performance outside the United States and Canada.

Follow the procedures at PGI 225.802-70 when placing a contract requiring performance outside the United States and Canada. Also see Subpart 225.74, Defense Contractors Outside the United States.

[70 FR 23801, May 5, 2005]

225.802-71 End use certificates.

Contracting officers considering the purchase of an item from a foreign source may encounter a request for the signing of a certificate to indicate that the Armed Forces of the United States is the end user of the item, and that the U.S. Government will not transfer the item to third parties without authorization from the Government of the country selling the item. When encountering this situation, refer to DoD Directive 2040.3, End Use Certificates, for guidance.

225.870 Contracting with Canadian contractors.

225.870-1 General.

(a) The Canadian Government guarantees to the U.S. Government all commitments, obligations, and covenants of the Canadian Commercial Corporation under any contract or order issued to the Corporation by any contracting office of the U.S. Government. The Canadian Government has waived notice of any change or modification that may be made, from time to time, in these commitments, obligations, or covenants.

(b) For production planning purposes, Canada is part of the defense industrial base (see 225.870-2(b)).

(c) The Canadian Commercial Corporation will award and administer contracts with contractors located in Canada, except for—

(1) Negotiated acquisitions for experimental, developmental, or research work under projects other than the Defense Development Sharing Program;

(2) Acquisitions of unusual or compelling urgency;

(3) Acquisitions at or below the simplified acquisition threshold; or

(4) Acquisitions made by DoD activities located in Canada.

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(d) For additional information on production rights, data, and information; services provided by Canadian Commercial Corporation; audit; and inspection, see PGI 225.870-1(d).

[68 FR 15621, Mar. 31, 2003, as amended at 70 FR 73154, Dec. 9, 2005]

225.870-2 Solicitation of Canadian contractors.

(a) If requested, furnish a solicitation to the Canadian Commercial Corporation even if no Canadian firm is solicited.

(b) Handle acquisitions at or below the simplified acquisition threshold directly with Canadian firms and not through the Canadian Commercial Corporation.

[68 FR 15621, Mar. 31, 2003, as amended at 72 FR 20758, Apr. 26, 2007]

225.870-3 Submission of offers.

(a) As indicated in 225.870-4, the Canadian Commercial Corporation is the prime contractor. To indicate acceptance of offers by individual Canadian companies, the Canadian Commercial Corporation issues a letter supporting the Canadian offer and containing the following information:

(1) Name of the Canadian offeror.

(2) Confirmation and endorsement of the offer in the name of the Canadian Commercial Corporation.

(3) A statement that the Corporation shall subcontract 100 percent with the offeror.

(b) When a Canadian offer cannot be processed through the Canadian Commercial Corporation in time to meet the date for receipt of offers, the Corporation may permit Canadian firms to submit offers directly. However, the contracting officer shall receive the Canadian Commercial Corporation's endorsement before contract award.

(c) The Canadian Commercial Corporation will submit all sealed bids in terms of U.S. currency. Do not adjust contracts awarded under sealed bidding for losses or gains from fluctuation in exchange rates.

(d) Except for sealed bids, the Canadian Commercial Corporation normally will submit offers and quotations in terms of Canadian currency. The Corporation may, at the time of submit-

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ting an offer, elect to quote and receive payment in terms of U.S. currency, in which case the contract—

(1) Shall provide for payment in U.S. currency; and

(2) Shall not be adjusted for losses or gains from fluctuation in exchange rates.

225.870-4 Contracting procedures.

(a) Except for contracts described in 225.870-1(c)(1) through (4), award individual contracts covering purchases from suppliers located in Canada to the Canadian Commercial Corporation, 11th Floor, 50 O'Connor Street, Ottawa, Ontario, Canada, K1A-0S6.

(b) Direct communication with the Canadian supplier is authorized and encouraged in connection with all technical aspects of the contract, provided the Corporation's approval is obtained on any matters involving changes to the contract.

(c) Identify in the contract, the type of currency, *i.e.*, U.S. or Canadian. Contracts that provide for payment in Canadian currency shall—

(1) Quote the contract price in terms of Canadian dollars and identify the amount by the initials "CN", *e.g.*, \$1,647.23CN; and

(2) Clearly indicate on the face of the contract the U.S./Canadian conversion rate at the time of award and the U.S. dollar equivalent of the Canadian dollar contract amount.

225.870-5 Contract administration.

Follow the contract administration procedures at PGI 225.870-5.

[70 FR 73155, Dec. 9, 2005]

225.870-6 Termination procedures.

When contract termination is necessary, follow the procedures at 249.7000.

[71 FR 27645, May 12, 2006]

225.870-7 Acceptance of Canadian supplies.

For information on the acceptance of Canadian supplies, see PGI 225.870-7.

[70 FR 73155, Dec. 9, 2005]

225.870-8 Industrial security.

Industrial security for Canada shall be in accordance with the U.S.-Canada

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Industrial Security Agreement of March 31, 1952, as amended.

225.871 North Atlantic Treaty Organization (NATO) cooperative projects.

225.871-1 Scope.

This section implements 22 U.S.C. 2767 and 10 U.S.C. 2350b.

[70 FR 73155, Dec. 9, 2005]

225.871-2 Definitions.

As used in this section—

(a) *Cooperative project* means a jointly managed arrangement—

(1) Described in a written agreement between the parties;

(2) Undertaken to further the objectives of standardization, rationalization, and interoperability of the armed forces of NATO member countries; and

(3) Providing for—

(i) One or more of the other participants to share with the United States the cost of research and development, testing, evaluation, or joint production (including follow-on support) of certain defense articles;

(ii) Concurrent production in the United States and in another member country of a defense article jointly developed; or

(iii) Acquisition by the United States of a defense article or defense service from another member country.

(b) *Other participant* means a cooperative project participant other than the United States.

225.871-3 General.

(a) *Cooperative project authority.* (1) Departments and agencies, that have authority to do so, may enter into cooperative project agreements with NATO or with one or more member countries of NATO under DoDD 5530.3, International Agreements.

(2) Under laws and regulations governing the negotiation and implementation of cooperative project agreements, departments and agencies may enter into contracts, or incur other obligations, on behalf of other participants without charge to any appropriation or contract authorization.

(3) Agency heads are authorized to solicit and award contracts to implement cooperative projects.

(b) Contracts implementing cooperative projects shall comply with all applicable laws relating to Government acquisition, unless a waiver is granted under 225.871-4. A waiver of certain laws and regulations may be obtained if the waiver—

(1) Is required by the terms of a written cooperative project agreement;

(2) Will significantly further NATO standardization, rationalization, and interoperability; and

(3) Is approved by the appropriate DoD official.

225.871-4 Statutory waivers.

(a) For contracts or subcontracts placed outside the United States, the Deputy Secretary of Defense may waive any provision of law that specifically prescribes—

(1) Procedures for the formation of contracts;

(2) Terms and conditions for inclusion in contracts;

(3) Requirements or preferences for—
(i) Goods grown, produced, or manufactured in the United States or in U.S. Government-owned facilities; or

(ii) Services to be performed in the United States; or

(4) Requirements regulating the performance of contracts.

(b) There is no authority for waiver of—

(1) Any provision of the Arms Export Control Act (22 U.S.C. 2751);

(2) Any provision of 10 U.S.C. 2304;

(3) The cargo preference laws of the United States, including the Military Cargo Preference Act of 1904 (10 U.S.C. 2631) and the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)); or

(4) Any of the financial management responsibilities administered by the Secretary of the Treasury.

(c) To request a waiver under a cooperative project, follow the procedures at PGI 225.871-4.

(d) Obtain the approval of the Deputy Secretary of Defense before committing to make a waiver in an agreement or a contract.

[68 FR 15621, Mar. 31, 2003, as amended at 71 FR 62565, Oct. 26, 2006]

225.871-5 Directed Subcontracting.

(a) The Director of Defense Procurement and Acquisition Policy may authorize the direct placement of subcontracts with particular subcontractors. Directed subcontracting is not authorized unless specifically addressed in the cooperative project agreement.

(b) In some instances, it may not be feasible to name specific subcontractors at the time the agreement is concluded. However, the agreement shall clearly state the general provisions for work sharing at the prime and subcontract level. For additional information on cooperative project agreements, see PGI 225.871-5.

[68 FR 15621, Mar. 31, 2003, as amended at 70 FR 73155, Dec. 9, 2005]

225.871-6 Disposal of property.

Dispose of property that is jointly acquired by the members of a cooperative project under the procedures established in the agreement or in a manner consistent with the terms of the agreement, without regard to any laws of the United States applicable to the disposal of property owned by the United States.

[70 FR 73155, Dec. 9, 2005]

225.871-7 Congressional notification.

(a) Congressional notification is required when DoD makes a determination to award a contract or subcontract to a particular entity, if the determination was not part of the certification made under 22 U.S.C. 2767(f) before finalizing the cooperative agreement.

(1) Departments and agencies shall provide a proposed Congressional notice to the Director of Defense Procurement and Acquisition Policy in sufficient time to forward to Congress before the time of contract award.

(2) The proposed notice shall include the reason it is necessary to use the authority to designate a particular contractor or subcontractor.

(b) Congressional notification is also required each time a statutory waiver under 225.871-4 is incorporated in a contract or a contract modification, if such information was not provided in the certification to Congress before finalizing the cooperative agreement.

225.872 Contracting with qualifying country sources.**225.872-1 General.**

(a) As a result of memoranda of understanding and other international agreements, DoD has determined it inconsistent with the public interest to apply restrictions of the Buy American Act or the Balance of Payments Program to the acquisition of qualifying country end products from the following qualifying countries:

Australia
Belgium
Canada
Denmark
Egypt
Federal Republic of Germany
Finland
France
Greece
Israel
Italy
Luxembourg
Netherlands
Norway
Portugal
Spain
Sweden
Switzerland
Turkey
United Kingdom of Great Britain and Northern Ireland.

(b) Individual acquisitions of qualifying country end products from the following qualifying country may, on a purchase-by-purchase basis (see 225.872-4), be exempted from application of the Buy American Act and the Balance of Payments Program as inconsistent with the public interest: Austria.

(c) The determination in paragraph (a) of this subsection does not limit the authority of the Secretary concerned to restrict acquisitions to domestic sources or reject an otherwise acceptable offer from a qualifying country source when considered necessary for national defense reasons.

[68 FR 15621, Mar. 31, 2003, as amended at 69 FR 8116, Feb. 23, 2004; 75 FR 32641, June 8, 2010]

225.872-2 Applicability.

(a) This section applies to all acquisitions of supplies except those restricted by—

(1) U.S. National Disclosure Policy, DoDD 5230.11, Disclosure of Classified Military Information to Foreign Governments and International Organizations;

(2) U.S. defense mobilization base requirements purchased under the authority of FAR 6.302-3(a)(2)(i), except for quantities in excess of that required to maintain the defense mobilization base. This restriction does not apply to Canadian planned producers.

(i) Review individual solicitations to determine whether this restriction applies.

(ii) Information concerning restricted items may be obtained from the Deputy Under Secretary of Defense (Industrial Affairs);

(3) Other U.S. laws or regulations (*e.g.*, the annual DoD appropriations act); and

(4) U.S. industrial security requirements.

(b) This section does not apply to construction contracts.

225.872-3 Solicitation procedures.

(a) Except for items developed under the U.S./Canadian Development Sharing Program, use the criteria for soliciting and awarding contracts to small business concerns under FAR Part 19 without regard to whether there are potential qualifying country sources for the end product. Do not consider an offer of a qualifying country end product if the solicitation is identified for the exclusive participation of small business concerns.

(b) Send solicitations directly to qualifying country sources. Solicit Canadian sources through the Canadian Commercial Corporation in accordance with 225.870.

(c) Use international air mail if solicitation destinations are outside the United States and security classification permits such use.

(d) If unusual technical or security requirements preclude the acquisition of otherwise acceptable defense equipment from qualifying country sources, review the need for such requirements. Do not impose unusual technical or security requirements solely for the purpose of precluding the acquisition of defense equipment from qualifying countries.

(e) Do not automatically exclude qualifying country sources from submitting offers because their supplies have not been tested and evaluated by the department or agency.

(1) Consider the adequacy of qualifying country service testing on a case-by-case basis. Departments or agencies that must limit solicitations to sources whose items have been tested and evaluated by the department or agency shall consider supplies from qualifying country sources that have been tested and accepted by the qualifying country for service use.

(2) The department or agency may perform a confirmatory test, if necessary.

(3) Apply U.S. test and evaluation standards, policies, and procedures when the department or agency decides that confirmatory tests of qualifying country end products are necessary.

(4) If it appears that these provisions might adversely delay service programs, obtain the concurrence of the Under Secretary of Defense (Acquisition, Technology, and Logistics), before excluding the qualifying country source from consideration.

(f) Permit industry representatives from a qualifying country to attend symposia, program briefings, prebid conferences (see FAR 14.207 and 15.201(c)), and similar meetings that address U.S. defense equipment needs and requirements. When practical, structure these meetings to allow attendance by representatives of qualifying country concerns.

[68 FR 15621, Mar. 31, 2003, as amended at 72 FR 20758, Apr. 26, 2007]

225.872-4 Individual determinations.

If the offer of an end product from a qualifying country source listed in 225.872-1(b), as evaluated, is low or otherwise eligible for award, prepare a determination and findings exempting the acquisition from the Buy American Act and the Balance of Payments Program as inconsistent with the public interest, unless another exception such as the Trade Agreements Act applies. Follow the procedures at PGI 225.872-4.

[70 FR 73155, Dec. 9, 2005]

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225.872-5 Contract administration.

(a) Arrangements exist with some qualifying countries to provide reciprocal contract administration services. Some arrangements are at no cost to either government. To determine whether such an arrangement has been negotiated and what contract administration functions are covered, contact the Deputy Director of Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), ((703) 697-9351, DSN 227-9351).

(b) Follow the contract administration procedures at PGI 225.872-5(b).

(c) Information on quality assurance delegations to foreign governments is in Subpart 246.4, Government Contract Quality Assurance.

[68 FR 15621, Mar. 31, 2003, as amended at 70 FR 73155, Dec. 9, 2005; 72 FR 30278, May 31, 2007]

225.872-6 Audit.

(a) Memoranda of understanding with some qualifying countries contain annexes that provide for reciprocal “no-cost” audits of contracts and subcontracts (pre- and post-award).

(b) To determine if such an annex is applicable to a particular qualifying country, contact the Deputy Director of Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), ((703) 697-9351, DSN 227-9351).

(c) Handle requests for audits in qualifying countries in accordance with 215.404-2(c), but follow the additional procedures at PGI 225.872-6(c).

[68 FR 15621, Mar. 31, 2003, as amended at 70 FR 73155, Dec. 9, 2005; 72 FR 30278, May 31, 2007]

225.872-7 Industrial security for qualifying countries.

The required procedures for safeguarding classified defense information necessary for the performance of contracts awarded to qualifying country sources are in the DoD Industrial Security Regulation DoD 5220.22-R (implemented for the Army by AR 380-49; for the Navy by SECNAV Instruction 5510.1H; for the Air Force by AFI 31-601; for the Defense Information Systems Agency by DCA Instruction 240-110-8; and for the National Imagery and Map-

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ping Agency by NIMA Instruction 5220.22).

225.872-8 Subcontracting with qualifying country sources.

In reviewing contractor subcontracting procedures, the contracting officer shall ensure that the contract does not preclude qualifying country sources from competing for subcontracts, except when restricted by national security interest reasons, mobilization base considerations, or applicable U.S. laws or regulations (see the clause at 252.225-7002, Qualifying Country Sources as Subcontractors).

225.873 Waiver of United Kingdom commercial exploitation levies.

225.873-1 Policy.

DoD and the Government of the United Kingdom (U.K.) have agreed to waive U.K. commercial exploitation levies and U.S. nonrecurring cost recoupment charges on a reciprocal basis. For U.K. levies to be waived, the offeror or contractor shall identify the levies and the contracting officer shall request a waiver before award of the contract or subcontract under which the levies are charged.

225.873-2 Procedures.

When an offeror or a contractor identifies a levy included in an offered or contract price, follow the procedures at PGI 225.873-2.

[70 FR 73155, Dec. 9, 2005]

Subpart 225.9—Customs and Duties

SOURCE: 68 FR 15626, Mar. 31, 2003, unless otherwise noted.

225.900-70 Definition.

“Component,” as used in this subpart, means any item supplied to the Government as part of an end product or of another component.

[74 FR 68383, Dec. 24, 2009]

225.901 Policy.

Unless the supplies are entitled to duty-free treatment under a special category in the Harmonized Tariff Schedule of the United States (*e.g.*, the

Caribbean Basin Economic Recovery Act or a Free Trade Agreement), or unless the supplies already have entered into the customs territory of the United States and the contractor already has paid the duty, DoD will issue duty-free entry certificates for—

- (1) Qualifying country supplies (end products and components);
- (2) Eligible products (end products but not components) under contracts covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement; and
- (3) Other foreign supplies for which the contractor estimates that duty will exceed \$200 per shipment into the customs territory of the United States.

[68 FR 15626, Mar. 31, 2003, as amended at 69 FR 1928, Jan. 13, 2004; 70 FR 2363, Jan. 13, 2005]

225.902 Procedures.

Follow the entry and release procedures at PGI 225.902.

[70 FR 73155, Dec. 9, 2005]

225.903 Exempted supplies.

(b)(i) For an explanation of the term “supplies,” see PGI 225.903(b)(i).

(ii) The duty-free certificate shall be printed, stamped, or typed on the face of, or attached to, Customs Form 7501. A duly designated officer or civilian official of the appropriate department or agency shall execute the certificate in the format provided at PGI 225.903(b)(ii).

[70 FR 73155, Dec. 9, 2005]

Subpart 225.10—Additional Foreign Acquisition Regulations

225.1070 Clause deviations in overseas contracts.

See 201.403(2) for approval authority for clause deviations in overseas contracts with governments of North Atlantic Treaty Organization (NATO) countries or other allies or with United Nations or NATO organizations.

[65 FR 19856, Apr. 13, 2000]

Subpart 225.11—Solicitation Provisions and Contract Clauses

SOURCE: 68 FR 16526, Mar. 31, 2003, unless otherwise noted.

225.1100 Scope of subpart.

This subpart prescribes the clauses that implement Subparts 225.1 through 225.10. The clauses that implement Subparts 225.70 through 225.75 are prescribed within those subparts.

225.1101 Acquisition of supplies.

(1)(i) Use the provision at 252.225-7000, Buy American Act—Balance of Payments Program Certificate, instead of the provision at FAR 52.225-2, Buy American Act Certificate. Use the provision in any solicitation that includes the clause at 252.225-7001, Buy American Act and Balance of Payments Program.

(ii) Use the provision with its Alternate I when the acquisition is of end products listed in 225.401-70 in support of operations in Afghanistan.

(2)(i) Use the clause at 252.225-7001, Buy American Act and Balance of Payments Program, instead of the clause at FAR 52.225-1, Buy American Act—Supplies, in solicitations and contracts unless—

(A) All line items will be acquired from a particular source or sources under the authority of FAR 6.302-3;

(B) All line items must be domestic or qualifying country end products in accordance with Subpart 225.70. (However, the clause may still be required if Subpart 225.70 requires manufacture of the end product in the United States or in the United States or Canada, without a corresponding requirement for use of domestic components);

(C) An exception to the Buy American Act or Balance of Payments Program applies (see FAR 25.103, 225.103, and 225.7501);

(D) One or both of the following clauses will apply to all line items in the contract:

(1) 252.225-7021, Trade Agreements.

(2) 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program; or

(E) All line items will be acquired using a procedure specified in 225.7703-1(a).

(ii) Use the clause with its Alternate I when the acquisition is of end products listed in 252.401-70 in support of operations in Afghanistan.

(3) Use the clause at 252.225-7002, Qualifying Country Sources as Subcontractors, in solicitations and contracts that include one of the following clauses:

(i) 252.225-7001, Buy American Act and Balance of Payments Program.

(ii) 252.225-7021, Trade Agreements.

(iii) 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program.

(4) Use the clause at 252.225-7013, Duty-Free Entry, instead of the clause at FAR 52.225-8. Do not use the clause for acquisitions of supplies that will not enter the customs territory of the United States.

(5)(i) Except as provided in paragraph (7) of this section, use the provision at 252.225-7020, Trade Agreements Certificate, instead of the provision at FAR 52.225-6, Trade Agreements Certificate, in solicitations that include the clause at 252.225-7021, Trade Agreements.

(ii) Use the provision with its Alternate I when the acquisition is of end products in support of operations in Afghanistan.

(6)(i) Use the clause at 252.225-7021, Trade Agreements, instead of the clause at FAR 52.225-5, Trade Agreements, if the World Trade Organization Government Procurement Agreement applies.

(ii) Use the clause with its Alternate I in solicitations and contracts that include the clause at 252.225-7024, Requirement for Products or Services from Iraq or Afghanistan, unless the clause at 252.225-7024 has been modified to provide a preference only for the products of Afghanistan.

(iii) Use the clause with its Alternate II when the acquisition is of end products in support of operations in Afghanistan and Alternate I is not applicable.

(iv) Do not use the clause if—

(A) Purchase from foreign sources is restricted, unless the contracting officer anticipates a waiver of the restriction; or

(B) The clause at 252.225-7026, Acquisition Restricted to Products or Serv-

ices from Iraq or Afghanistan, is included in the solicitation and contract.

(v) The acquisition of eligible and noneligible products under the same contract may result in the application of trade agreements to only some of the items acquired. In such case, indicate in the Schedule those items covered by the Trade Agreements clause.

(7) Use the provision at 252.225-7022, Trade Agreements Certificate—Inclusion of Iraqi End Products, instead of the provision at FAR 52.225-6, Trade Agreements Certificate, in solicitations that include the clause at 252.225-7021, Trade Agreements, with its Alternate I.

(8) Use the provision at 252.225-7032, Waiver of United Kingdom Levies—Evaluation of Offers, in solicitations if a U.K. firm is expected to—

(i) Submit an offer; or

(ii) Receive a subcontract exceeding \$1 million.

(9) Use the clause at 252.225-7033, Waiver of United Kingdom Levies, in solicitations and contracts if a U.K. firm is expected to—

(i) Submit an offer; or

(ii) Receive a subcontract exceeding \$1 million.

(10)(i) Use the provision at 252.225-7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate, instead of the provision at FAR 52.225-4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate, in solicitations that include the clause at 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program.

(ii) Use the provision with its Alternate I when the clause at 252.225-7036 is used with its Alternate I.

(iii) Use the provision with its alternate II when the clause at 252.225-7036 is used with its Alternate II.

(iv) Use the provision with its Alternate III when the clause at 252.225-7036 is used with its Alternate III.

(11)(i) Except as provided in paragraph (11)(ii) of this section, use the clause at 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, instead of the clause at FAR 52.225-3, Buy American Act—Free Trade Agreements—Israeli

Trade Act, in solicitations and contracts for the items listed at 225.401-70, when the estimated value equals or exceeds \$25,000, but is less than \$203,000, and a Free Trade Agreement applies to the acquisition.

(A) Use the basic clause when the estimated value equals or exceeds \$70,079, except if the acquisition is of end products in support of operations in Afghanistan, use with its Alternate II.

(B) Use the clause with its Alternate I when the estimated value equals or exceeds \$25,000 but is less than \$70,079, except if the acquisition is of end products in support of operations in Afghanistan, use with its Alternate III.

(ii) Do not use the clause if—

(A) Purchase from foreign sources is restricted (see 225.401(a)(2)), unless the contracting officer anticipates a waiver of the restriction;

(B) Acquiring information technology that is a commercial item, using fiscal year 2004 or subsequent funds (Section 535 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199), and the same provision in subsequent appropriations acts); or

(C) Using a procedure specified in 225.7703-1(a).

(iii) The acquisition of eligible and noneligible products under the same contract may result in the application of a Free Trade Agreement to only some of the items acquired. In such case, indicate in the Schedule those items covered by the Buy American Act—Free Trade Agreements—Balance of Payments Program clause.

[75 FR 81916, Dec. 29, 2010]

225.1103 Other provisions and clauses.

(1) Unless the contracting officer knows that the prospective contractor is not a domestic concern, use the clause at 252.225-7005, Identification of Expenditures in the United States, in solicitations and contracts that—

(i) Exceed the simplified acquisition threshold; and

(ii) Are for the acquisition of—

(A) Supplies for use outside the United States;

(B) Construction to be performed outside the United States; or

(C) Services to be performed primarily outside the United States.

(2) Use the clause at 252.225-7041, Correspondence in English, in solicitations and contracts when contract performance will be wholly or in part in a foreign country.

(3) Use the provision at 252.225-7042, Authorization to Perform, in solicitations when contract performance will be wholly or in part in a foreign country.

(4) Unless an exception in 225.770-3 applies, use the clause at 252.225-7007, Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies, in solicitations and contracts involving the delivery of items covered by the United States Munitions List.

[68 FR 16526, Mar. 31, 2003, as amended at 71 FR 39006, July 11, 2006; 71 FR 53046, Sept. 8, 2006]

Subpart 225.70—Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Acquisition

225.7000 Scope of subpart.

(a) This subpart contains restrictions on the acquisition of foreign products and services, imposed by DoD appropriations and authorization acts and other statutes. Refer to the acts to verify current applicability of the restrictions.

(b) Nothing in this subpart affects the applicability of the Buy American Act or the Balance of Payments Program.

[56 FR 36367, July 31, 1991, as amended at 62 FR 2856, Jan. 17, 1997; 68 FR 15627, Mar. 31, 2003]

225.7001 Definitions.

As used in this subpart—

(a) *Bearing components* is defined in the clause at 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings.

(b) “Component” is defined in the clauses at 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals; 252.225-7012, Preference for Certain Domestic Commodities, and 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings, except that for use in 225.7007, the term has the meaning given in the

225.7002

clause at 252.225-7019, Restriction on Acquisition of Anchor and Mooring Chain.

(c) “End product” is defined in the clause at 252.225-7012, Preference for Certain Domestic Commodities.

(d) *Hand or measuring tools* means those tools listed in Federal supply classifications 51 and 52, respectively.

(e) *Specialty metals* is defined in the clause at 252.225-7014, Preference for Domestic Specialty Metals.

[61 FR 10899, Mar. 18, 1996, as amended at 61 FR 50453, Sept. 26, 1996; 67 FR 20697, Apr. 26, 2002; 71 FR 14111, Mar. 21, 2006; 74 FR 37636, July 29, 2009; 74 FR 68383, Dec. 24, 2009]

225.7002 Restrictions on food, clothing, fabrics, and hand or measuring tools.

225.7002-1 Restrictions.

The following restrictions implement 10 U.S.C. 2533a (the “Berry Amendment”). Except as provided in subsection 225.7002-2, do not acquire—

(a) Any of the following items, either as end products or components, unless the items have been grown, reprocessed, reused, or produced in the United States:

- (1) Food.
- (2) Clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing and the materials and components thereof. Clothing includes items such as outerwear, headwear, underwear, nightwear, footwear, hosiery, handwear, belts, badges, and insignia. For additional guidance and examples, see PGI 225.7002-1(a)(2).
- (3) Tents, tarpaulins, or covers.
- (4) Cotton and other natural fiber products.
- (5) Woven silk or woven silk blends.
- (6) Spun silk yarn for cartridge cloth.
- (7) Synthetic fabric or coated synthetic fabric, including all textile fibers and yarns that are for use in such fabrics.
- (8) Canvas products.
- (9) Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).
- (10) Any item of individual equipment (Federal Supply Class 8465) manufactured from or containing any of the

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fibers, yarns, fabrics, or materials listed in this paragraph (a).

(b) Hand or measuring tools, unless the tools were produced in the United States. For additional guidance, see PGI 225.7002-1(b).

[67 FR 20697, Apr. 26, 2002, as amended at 71 FR 39009, July 11, 2006; 71 FR 58537, Oct. 4, 2006; 72 FR 2638, Jan. 22, 2007; 74 FR 37636, July 29, 2009; 76 FR 52133, Aug. 19, 2011]

225.7002-2 Exceptions.

Acquisitions in the following categories are not subject to the restrictions in 225.7002-1:

(a) Acquisitions at or below the simplified acquisition threshold.

(b) Acquisitions of any of the items in 225.7002-1, if the Secretary concerned determines that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices. (See the requirement in 205.301 for synopsis within 7 days after contract award when using this exception.)

(1) The following officials are authorized, without power of redelegation, to make such a domestic nonavailability determination:

(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics).

(ii) The Secretary of the Army.

(iii) The Secretary of the Navy.

(iv) The Secretary of the Air Force.

(v) The Director of the Defense Logistics Agency.

(2) The supporting documentation for the determination shall include—

(i) An analysis of alternatives that would not require a domestic nonavailability determination; and

(ii) A written certification by the requiring activity, with specificity, why such alternatives are unacceptable.

(3) Defense agencies other than the Defense Logistics Agency shall follow the procedures at PGI 225.7002-2(b)(3) when submitting a request for a domestic nonavailability determination.

(4) Follow the procedures at PGI 225.7002-2(b)(4) for reciprocal use of domestic nonavailability determinations.

(c) Acquisitions of items listed in FAR 25.104(a).

(d) Acquisitions outside the United States in support of combat operations.

(e) Acquisitions of perishable foods by or for activities located outside the United States for personnel of those activities.

(f) Acquisitions of food or hand or measuring tools—

(1) In support of contingency operations; or

(2) For which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with FAR 6.302-2.

(g) Emergency acquisitions by activities located outside the United States for personnel of those activities.

(h) Acquisitions by vessels in foreign waters.

(i) Acquisitions of items specifically for commissary resale.

(j) Acquisitions of incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, for which the estimated value of the cotton, other natural fibers, or wool—

(1) Is not more than 10 percent of the total price of the end product; and

(2) Does not exceed the simplified acquisition threshold.

(k) Acquisitions of waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives.

(l) Acquisitions of foods manufactured or processed in the United States, regardless of where the foods (and any component if applicable) were grown or produced. However, in accordance with Section 8118 of the DoD Appropriations Act for Fiscal Year 2005 (Pub. L. 108-287), this exception does not apply to fish, shellfish, or seafood manufactured or processed in the United States or fish, shellfish, or seafood contained in foods manufactured or processed in the United States.

(m) Acquisitions of fibers and yarns that are for use in synthetic fabric or coated synthetic fabric (but not the purchase of the synthetic or coated synthetic fabric itself), if—

(1) The fabric is to be used as a component of an end product that is not a textile product. Examples of textile products, made in whole or in part of fabric, include—

(i) Draperies, floor coverings, furnishings, and bedding (Federal Supply Group 72, Household and Commercial Furnishings and Appliances);

(ii) Items made in whole or in part of fabric in Federal Supply Group 83, Textile/leather/furs/apparel/findings/tents/flags, or Federal Supply Group 84, Clothing, Individual Equipment and Insignia;

(iii) Upholstered seats (whether for household, office, or other use); and

(iv) Parachutes (Federal Supply Class 1670); or

(2) The fibers and yarns are para-aramid fibers and continuous filament para-aramid yarns manufactured in a qualifying country.

(n) Acquisitions of chemical warfare protective clothing when the acquisition furthers an agreement with a qualifying country. (See 225.003(10) and the requirement in 205.301 for synopsis within 7 days after contract award when using this exception.)

[67 FR 20697, Apr. 26, 2002, as amended at 68 FR 7442, Feb. 14, 2003; 69 FR 26509, May 13, 2004; 69 FR 31910, June 8, 2004; 70 FR 43073, July 26, 2005; 71 FR 34833, June 16, 2006; 71 FR 58537, Oct. 4, 2006; 72 FR 20765, Apr. 26, 2007; 72 FR 63123, Nov. 8, 2007; 73 FR 11356, Mar. 3, 2008; 73 FR 76971, Dec. 18, 2008; 74 FR 37636, July 29, 2009; 74 FR 52896, Oct. 15, 2009; 75 FR 34945, June 21, 2010; 76 FR 14589, Mar. 17, 2011; 76 FR 52133, <Aug. 19, 2011]

225.7002-3 Contract clauses.

Unless an exception applies—

(a) Use the clause at 252.225-7012, Preference for Certain Domestic Commodities, in solicitations and contracts exceeding the simplified acquisition threshold.

(b) Use the clause at 252.225-7015, Restriction on Acquisition of Hand or Measuring Tools, in solicitations and contracts exceeding the simplified acquisition threshold that require delivery of hand or measuring tools.

[61 FR 50453, Sept. 26, 1996, as amended at 67 FR 20698, Apr. 26, 2002; 68 FR 15627, Mar. 31, 2003; 74 FR 37636, July 29, 2009]

225.7003 Restrictions on acquisition of specialty metals.

225.7003-1 Definitions.

As used in this section—

(a) *Assembly, commercial derivative military article, commercially available*

225.7003-2

off-the-shelf item, component, electronic component, end item, high performance magnet, required form, and subsystem are defined in the clause at 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.

(b) *Automotive item*—

(1) Means a self-propelled military transport tactical vehicle, primarily intended for use by military personnel or for carrying cargo, such as—

(i) A high-mobility multipurpose wheeled vehicle;

(ii) An armored personnel carrier; or

(iii) A troop/cargo-carrying truckcar, truck, or van; and

(2) Does not include—

(i) A commercially available off-the-shelf vehicle; or

(ii) Construction equipment (such as bulldozers, excavators, lifts, or loaders) or other self-propelled equipment (such as cranes or aircraft ground support equipment).

(c) *Produce and specialty metal* are defined in the clauses at 252.225-7008, Restriction on Acquisition of Specialty Metals, and 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.

[74 FR 37636, July 29, 2009]

225.7003-2 Restrictions.

The following restrictions implement 10 U.S.C. 2533b. Except as provided in 225.7003-3—

(a) Do not acquire the following items, or any components of the following items, unless any specialty metals contained in the items or components are melted or produced in the United States (also see guidance at PGI 225.7003-2(a)):

(1) Aircraft.

(2) Missile or space systems.

(3) Ships.

(4) Tank or automotive items.

(5) Weapon systems.

(6) Ammunition.

(b) Do not acquire a specialty metal (e.g., raw stock, including bar, billet, slab, wire, plate, and sheet; castings; and forgings) as an end item, unless the specialty metal is melted or produced in the United States. This restriction applies to specialty metal acquired by a contractor for delivery to DoD as an end item, in addition to specialty metal acquired by DoD directly from

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the entity that melted or produced the specialty metal.

[74 FR 37636, July 29, 2009]

225.7003-3 Exceptions.

Procedures for submitting requests to the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) for a determination or approval as required in paragraph (b)(5), (c), or (d) of this subsection are at PGI 225.7003-3.

(a) Acquisitions in the following categories are not subject to the restrictions in 225.7003-2:

(1) Acquisitions at or below the simplified acquisition threshold.

(2) Acquisitions outside the United States in support of combat operations.

(3) Acquisitions in support of contingency operations.

(4) Acquisitions for which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with FAR 6.302-2.

(5) Acquisitions of items specifically for commissary resale.

(6) Acquisitions of items for test and evaluation under the foreign comparative testing program (10 U.S.C. 2350a(g)). However, this exception does not apply to any acquisitions under follow-on production contracts.

(b) One or more of the following exceptions may apply to an end item or component that includes any of the following, under a prime contract or subcontract at any tier. The restrictions in 225.7003-2 do not apply to the following:

(1) Electronic components, unless the Secretary of Defense, upon the recommendation of the Strategic Materials Protection Board pursuant to 10 U.S.C. 187, determines that the domestic availability of a particular electronic component is critical to national security.

(2)(i) Commercially available off-the-shelf (COTS) items containing specialty metals, except the restrictions do apply to contracts or subcontracts for the acquisition of—

(A) Specialty metal mill products, such as bar, billet, slab, wire, plate, and sheet, that have not been incorporated into end items, subsystems, assemblies, or components. Specialty

metal supply contracts issued by COTS producers are not subcontracts for the purposes of this exception;

(B) Forgings or castings of specialty metals, unless the forgings or castings are incorporated into COTS end items, subsystems, or assemblies;

(C) Commercially available high performance magnets that contain specialty metal, unless such high performance magnets are incorporated into COTS end items or subsystems (see PGI 225.7003-3(b)(6) for a table of applicability of specialty metals restrictions to magnets); and

(D) COTS fasteners, unless—

(1) The fasteners are incorporated into COTS end items, subsystems, or assemblies; or

(2) The fasteners qualify for the commercial item exception in paragraph (b)(3) of this subsection.

(ii) If this exception is used for an acquisition of COTS end items valued at \$5 million or more per item, the acquiring department or agency shall submit an annual report to the Director, Defense Procurement and Acquisition Policy, in accordance with the procedures at PGI 225.7003-3(b)(2).

(3) Fasteners that are commercial items and are acquired under a contract or subcontract with a manufacturer of such fasteners, if the manufacturer has certified that it will purchase, during the relevant calendar year, an amount of domestically melted or produced specialty metal, in the required form, for use in the production of fasteners for sale to DoD and other customers, that is not less than 50 percent of the total amount of the specialty metal that the manufacturer will purchase to carry out the production of such fasteners for all customers.

(4) Items listed in 225.7003-2(a), manufactured in a qualifying country or containing specialty metals melted or produced in a qualifying country.

(5) Specialty metal in any of the items listed in 225.7003-2 if the USD(AT&L), or an official authorized in accordance with paragraph (b)(5)(i) of this subsection, determines that specialty metal melted or produced in the United States cannot be acquired as and when needed at a fair and reasonable price in a satisfactory quality, a

sufficient quantity, and the required form (*i.e.*, a domestic nonavailability determination). See guidance in PGI 225.7003-3(b)(5).

(i) The Secretary of the military department concerned is authorized, without power of redelegation, to make a domestic nonavailability determination that applies to only one contract.

The supporting documentation for the determination shall include—

(A) An analysis of alternatives that would not require a domestic nonavailability determination; and

(B) Written documentation by the requiring activity, with specificity, why such alternatives are unacceptable.

(ii) A domestic nonavailability determination that applies to more than one contract (*i.e.*, a class domestic nonavailability determination), requires the approval of the USD(AT&L).

(A) At least 30 days before making a domestic nonavailability determination that would apply to more than one contract, the USD(AT&L) will, to the maximum extent practicable, and in a manner consistent with the protection of national security and confidential business information—

(1) Publish a notice on the Federal Business Opportunities Web site (<http://www.FedBizOps.gov> or any successor site) of the intent to make the domestic nonavailability determination; and

(2) Solicit information relevant to such notice from interested parties, including producers of specialty metal mill products.

(B) The USD(AT&L)—

(1) Will take into consideration all information submitted in response to the notice in making a class domestic nonavailability determination;

(2) May consider other relevant information that cannot be made part of the public record consistent with the protection of national security information and confidential business information; and

(3) Will ensure that any such domestic nonavailability determination and the rationale for the determination are made publicly available to the maximum extent consistent with the protection of national security and confidential business information.

(6) End items containing a minimal amount of otherwise noncompliant specialty metals (*i.e.*, specialty metals not melted or produced in the United States that are not covered by another exception listed in this paragraph (b)), if the total weight of noncompliant specialty metal does not exceed 2 percent of the total weight of all specialty metal in the end item. This exception does not apply to high performance magnets containing specialty metals. See PGI 225.7003-3(b)(6) for a table of applicability of specialty metals restrictions to magnets.

(c) *Compliance for commercial derivative military articles.* The restrictions at 225.7003-2(a) do not apply to an item acquired under a prime contract if—

(1) The offeror has certified, and subsequently demonstrates, that the offeror and its subcontractor(s) will individually or collectively enter into a contractual agreement or agreements to purchase a sufficient quantity of domestically melted or produced specialty metal in accordance with the provision at 252.225-7010; and

(2) The USD(AT&L), or the Secretary of the military department concerned, determines that the item is a commercial derivative military article (defense agencies see procedures at PGI 225.7003-3). The contracting officer shall submit the offeror's certification and a request for a determination to the appropriate official, through agency channels, and shall notify the offeror when a decision has been made.

(d) *National security waiver.* The USD(AT&L) may waive the restrictions at 225.7003-2 if the USD(AT&L) determines in writing that acceptance of the item is necessary to the national security interests of the United States (*see* procedures at PGI 225.7003-3). This authority may not be delegated.

(1) The written determination of the USD(AT&L)—

(i) Shall specify the quantity of end items to which the national security waiver applies;

(ii) Shall specify the time period over which the national security waiver applies; and

(iii) Shall be provided to the congressional defense committees before the determination is executed, except that in the case of an urgent national secu-

rity requirement, the determination may be provided to the congressional defense committees up to 7 days after it is executed.

(2) After making such a determination, the USD(AT&L) will—

(i) Ensure that the contractor or subcontractor responsible for the noncompliant specialty metal develops and implements an effective plan to ensure future compliance; and

(ii) Determine whether or not the noncompliance was knowing and willful. If the USD(AT&L) determines that the noncompliance was knowing and willful, the appropriate debarring and suspending official shall consider suspending or debarring the contractor or subcontractor until such time as the contractor or subcontractor has effectively addressed the issues that led to the noncompliance.

(3) Because national security waivers will only be granted when the acquisition in question is necessary to the national security interests of the United States, the requirement for a plan will be applied as a condition subsequent, and not a condition precedent, to the granting of a waiver.

[74 FR 37636, July 29, 2009, as amended at 75 FR 48280, Aug. 10, 2010]

225.7003-4 One-time waiver.

DoD may accept articles containing specialty metals that are not in compliance with the specialty metals clause of the contract if—

(a) Final acceptance takes place before September 30, 2010;

(b) The specialty metals were incorporated into items (whether end items or components) produced, manufactured, or assembled in the United States before October 17, 2006;

(c) The contracting officer determines in writing that—

(1) It would not be practical or economical to remove or replace the specialty metals incorporated in such items or to substitute items containing compliant materials;

(2) The contractor and any subcontractor responsible for providing items containing non-compliant specialty metals have in place an effective plan to ensure compliance with the specialty metals clause of the contract for

future items produced, manufactured, or assembled in the United States; and

(3) The non-compliance was not knowing or willful;

(d) The determination is approved by—

(1) The USD(AT&L); or

(2) The service acquisition executive of the military department concerned; and

(e) Not later than 15 days after approval of the determination, the contracting officer posts a notice on the Federal Business Opportunities Web site at <http://www.FedBizOpps.gov>, stating that a waiver for the contract has been granted under Section 842(b) of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364).

[74 FR 37636, July 29, 2009]

225.7003-5 Solicitation provision and contract clauses.

(a) Unless the acquisition is wholly exempt from the specialty metals restrictions at 225.7003-2 because the acquisition is covered by an exception in 225.7003-3(a) or (d) (but see paragraph (d) of this subsection)—

(1) Use the clause at 252.225-7008, Restriction on Acquisition of Specialty Metals, in solicitations and contracts that—

(i) Exceed the simplified acquisition threshold; and

(ii) Require the delivery of specialty metals as end items.

(2) Use the clause at 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, in solicitations and contracts that—

(i) Exceed the simplified acquisition threshold; and

(ii) Require delivery of any of the following items, or components of the following items, if such items or components contain specialty metal:

(A) Aircraft.

(B) Missile or space systems.

(C) Ships.

(D) Tank or automotive items.

(E) Weapon systems.

(F) Ammunition.

(b) Use the provision at 252.225-7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, in solicitations—

(1) That contain the clause at 252.225-7009; and

(2) For which the contracting officer anticipates that one or more offers of commercial derivative military articles may be received.

(c) If an agency cannot reasonably determine at time of acquisition whether some or all of the items will be used in support of combat operations or in support of contingency operations, the contracting officer should not rely on the exception at 225.7003-3(a)(2) or (3), but should include the appropriate specialty metals clause or provision in the solicitation and contract.

(d) If the solicitation and contract require delivery of a variety of contract line items containing specialty metals, but only some of the items are subject to domestic specialty metals restrictions, identify in the Schedule those items that are subject to the restrictions.

[74 FR 37636, July 29, 2009; 75 FR 48280, Aug. 10, 2010]

225.7004 Restriction on acquisition of foreign buses.

225.7004-1 Restriction.

In accordance with 10 U.S.C. 2534, do not acquire a multipassenger motor vehicle (bus) unless it is manufactured in the United States or Canada.

[68 FR 15627, Mar. 31, 2003]

225.7004-2 Applicability.

Apply this restriction if the buses are purchased, leased, rented, or made available under contracts for transportation services.

[68 FR 15627, Mar. 31, 2003]

225.7004-3 Exceptions.

This restriction does not apply in any of the following circumstances:

(a) Buses manufactured outside the United States and Canada are needed for temporary use because buses manufactured in the United States or Canada are not available to satisfy requirements that cannot be postponed. Such use may not, however, exceed the lead time required for acquisition and delivery of buses manufactured in the United States or Canada.

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(b) The requirement for buses is temporary in nature. For example, to meet a special, nonrecurring requirement or a sporadic and infrequent recurring requirement, buses manufactured outside the United States and Canada may be used for temporary periods of time. Such use may not, however, exceed the period of time needed to meet the special requirement.

(c) Buses manufactured outside the United States and Canada are available at no cost to the U.S. Government.

(d) The acquisition is for an amount at or below the simplified acquisition threshold.

[68 FR 15627, Mar. 31, 2003]

225.7004-4 Waiver.

The waiver criteria at 225.7008(a) apply to this restriction.

[68 FR 15627, Mar. 31, 2003, as amended at 74 FR 37639, July 29, 2009]

225.7005 Restriction on certain chemical weapons antidote.

225.7005-1 Restriction.

In accordance with 10 U.S.C. 2534, do not acquire chemical weapons antidote contained in automatic injectors, or the components for such injectors, unless the chemical weapons antidote or component is manufactured in the United States or Canada by a company that—

(a) Has received all required regulatory approvals; and

(b) Has the plant, equipment, and personnel to perform the contract in the United States or Canada at the time of contract award.

[74 FR 68384, Dec. 24, 2009]

225.7005-2 Exception.

This restriction does not apply if the acquisition is for an amount at or below the simplified acquisition threshold.

[68 FR 15627, Mar. 31, 2003]

225.7005-3 Waiver.

The waiver criteria at 225.7008(a) apply to this restriction.

[68 FR 15627, Mar. 31, 2003, as amended at 74 FR 37639, July 29, 2009]

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225.7006 Restriction on air circuit breakers for naval vessels.

225.7006-1 Restriction.

In accordance with 10 U.S.C. 2534, do not acquire air circuit breakers for naval vessels unless they are manufactured in the United States or Canada.

[68 FR 15627, Mar. 31, 2003]

225.7006-2 Exceptions.

This restriction does not apply if the acquisition is—

(a) For an amount at or below the simplified acquisition threshold; or

(b) For spare or repair parts needed to support air circuit breakers manufactured outside the United States. Support includes the purchase of spare air circuit breakers when those from alternate sources are not interchangeable.

[68 FR 15627, Mar. 31, 2003]

225.7006-3 Waiver.

(a) The waiver criteria at 225.7008(a) apply to this restriction.

(b) The Under Secretary of Defense (Acquisition, Technology, and Logistics) has waived the restriction for air circuit breakers manufactured in the United Kingdom. See 225.7008(b) for applicability.

[68 FR 15627, Mar. 31, 2003, as amended at 74 FR 37639, July 29, 2009]

225.7006-4 Solicitation provision and contract clause.

(a) Use the provision at 252.225-7037, Evaluation of Offers for Air Circuit Breakers, in solicitations requiring air circuit breakers for naval vessels unless—

(1) An exception applies; or

(2) A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the provision.

(b) Use the clause at 252.225-7038, Restriction on Acquisition of Air Circuit Breakers, in solicitations and contracts requiring air circuit breakers for naval vessels unless—

(1) An exception applies; or

(2) A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the clause.

[68 FR 15627, Mar. 31, 2003]

225.7007 Restrictions on anchor and mooring chain.

225.7007-1 Restrictions.

(a) In accordance with Section 8041 of the Fiscal Year 1991 DoD Appropriations Act (Public Law 101-511) and similar sections in subsequent DoD appropriations acts, do not acquire welded shipboard anchor and mooring chain, four inches or less in diameter, unless—

(1) It is manufactured in the United States, including cutting, heat treating, quality control, testing, and welding (both forging and shot blasting process); and

(2) The cost of the components manufactured in the United States exceeds 50 percent of the total cost of components.

(b) 10 U.S.C. 2534 also restricts acquisition of welded shipboard anchor and mooring chain, four inches or less in diameter, when used as a component of a naval vessel. However, the Appropriations Act restriction described in paragraph (a) of this subsection takes precedence over the restriction of 10 U.S.C. 2534.

[68 FR 15627, Mar. 31, 2003]

225.7007-2 Waiver.

(a) The Secretary of the department responsible for acquisition may waive the restriction in 225.7007-1(a), on a case-by-case basis, if—

(1) Sufficient domestic suppliers are not available to meet DoD requirements on a timely basis; and

(2) The acquisition is necessary to acquire capability for national security purposes.

(b) Document the waiver in a written determination and findings containing—

(1) The factors supporting the waiver; and

(2) A certification that the acquisition must be made in order to acquire capability for national security purposes.

(c) Provide a copy of the determination and findings to the House and Senate Committees on Appropriations.

[68 FR 15627, Mar. 31, 2003]

225.7007-3 Contract clause.

Unless a waiver has been granted, use the clause at 252.225-7019, Restriction on Acquisition of Anchor and Mooring Chain, in solicitations and contracts requiring welded shipboard anchor or mooring chain four inches or less in diameter.

[68 FR 15627, Mar. 31, 2003]

225.7008 Waiver of restrictions of 10 U.S.C. 2534.

(a) When specifically authorized by reference elsewhere in this subpart, the restrictions on certain foreign purchases under 10 U.S.C. 2534(a) may be waived as follows:

(1)(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)), without power of delegation, may waive a restriction for a particular item for a particular foreign country upon determination that—

(A) United States producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country; or

(B) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, or would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items under 225.872, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(ii) A notice of the determination to exercise the waiver authority shall be published in the FEDERAL REGISTER and submitted to the congressional defense committees at least 15 days before the effective date of the waiver.

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(iii) The effective period of the waiver shall not exceed 1 year.

(iv) For contracts entered into prior to the effective date of a waiver, provided adequate consideration is received to modify the contract, the waiver shall be applied as directed or authorized in the waiver to—

(A) Subcontracts entered into on or after the effective date of the waiver; and

(B) Options for the procurement of items that are exercised after the effective date of the waiver, if the option prices are adjusted for any reason other than the application of the waiver.

(2) The head of the contracting activity may waive a restriction on a case-by-case basis upon execution of a determination and findings that any of the following applies:

(i) The restriction would cause unreasonable delays.

(ii) Satisfactory quality items manufactured in the United States or Canada are not available.

(iii) Application of the restriction would result in the existence of only one source for the item in the United States or Canada.

(iv) Application of the restriction is not in the national security interests of the United States.

(v) Application of the restriction would adversely affect a U.S. company.

(3) A restriction is waived when it would cause unreasonable costs. The cost of an item of U.S. or Canadian origin is unreasonable if it exceeds 150 percent of the offered price, inclusive of duty, of items that are not of U.S. or Canadian origin.

(b) In accordance with the provisions of paragraphs (a)(1)(i) through (iii) of this section, the USD(AT&L) has waived the restrictions of 10 U.S.C. 2534(a) for certain items manufactured in the United Kingdom, including air circuit breakers for naval vessels (*see* 225.7006). This waiver applies to—

(1) Procurements under solicitations issued on or after August 4, 1998; and

(2) Subcontracts and options under contracts entered into prior to August 4, 1998, under the conditions described in paragraph (a)(1)(iv) of this section.

[74 FR 37639, July 29, 2009]

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225.7009 Restriction on ball and roller bearings.

225.7009–1 Scope.

This section implements Section 8065 of the Fiscal Year 2002 DoD Appropriations Act (Pub. L. 107–117) and the same restriction in subsequent DoD appropriations acts.

[71 FR 14111, Mar. 21, 2006]

225.7009–2 Restriction.

(a) Do not acquire ball and roller bearings unless—

(1) The bearings are manufactured in the United States or Canada; and

(2) For each ball or roller bearing, the cost of the bearing components manufactured in the United States or Canada exceeds 50 percent of the total cost of the bearing components of that ball or roller bearing.

(b) The restriction at 225.7009–2 may also apply to bearings that are made from specialty metals, such as high carbon chrome steel (bearing steel).

[75 FR 76300, Dec. 8, 2010, as amended at 76 FR 32843, June 6, 2011]

225.7009–3 Exception.

The restriction in 225.7009–2 does not apply to contracts or subcontracts for the acquisition of commercial items, except for commercial ball and roller bearings acquired as end items.

[71 FR 14111, Mar. 21, 2006]

225.7009–4 Waiver.

The Secretary of the department responsible for acquisition or, for the Defense Logistics Agency, the Component Acquisition Executive, may waive the restriction in 225.7009–2, on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that—

(a) Adequate domestic supplies are not available to meet DoD requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[71 FR 14111, Mar. 21, 2006]

225.7009–5 Contract clause.

Use the clause at 252.225–7016, Restriction on Acquisition of Ball and

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Roller Bearings, in solicitations and contracts, unless—

(a) The items being acquired are commercial items other than ball or roller bearings acquired as end items;

(b) The items being acquired do not contain ball and roller bearings; or

(c) A waiver has been granted in accordance with 225.7009-4.

[71 FR 14112, Mar. 21, 2006]

225.7010 [Reserved]

225.7011 Restriction on carbon, alloy, and armor steel plate.

225.7011-1 Restriction.

(a) In accordance with Section 8111 of the Fiscal Year 1992 DoD Appropriations Act (Pub. L. 102-172) and similar sections in subsequent DoD appropriations acts, do not acquire any of the following types of carbon, alloy, or armor steel plate for use in a Government-owned facility or a facility under the control of (e.g., leased by) DoD, unless it is melted and rolled in the United States or Canada:

(1) Carbon, alloy, or armor steel plate in Federal Supply Class 9515.

(2) Carbon, alloy, or armor steel plate described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute.

(b) This restriction—

(1) Applies to the acquisition of carbon, alloy, or armor steel plate as a finished steel mill product that may be used “as is” or may be used as an intermediate material for the fabrication of an end product; and

(2) Does not apply to the acquisition of an end product (e.g., a machine tool), to be used in the facility, that contains carbon, alloy, or armor steel plate as a component.

[71 FR 75894, Dec. 19, 2006]

225.7011-2 Waiver.

The Secretary of the department responsible for acquisition may waive this restriction, on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that—

(a) Adequate U.S. or Canadian supplies are not available to meet DoD requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[68 FR 15627, Mar. 31, 2003]

225.7011-3 Contract clause.

Unless a waiver has been granted, use the clause at 252.225-7030, Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate, in solicitations and contracts that—

(a) Require the delivery to the Government of carbon, alloy, or armor steel plate that will be used in a Government-owned facility or a facility under the control of DoD; or

(b) Require contractors operating in a Government-owned facility or a facility under the control of DoD to purchase carbon, alloy, or armor steel plate.

[68 FR 15627, Mar. 31, 2003, as amended at 71 FR 75894, Dec. 19, 2006]

225.7012 Restriction on supercomputers.

225.7012-1 Restriction.

In accordance with Section 8112 of Public Law 100-202, and similar sections in subsequent DoD appropriations acts, do not purchase a supercomputer unless it is manufactured in the United States.

[68 FR 15627, Mar. 31, 2003]

225.7012-2 Waiver.

The Secretary of Defense may waive this restriction, on a case-by-case basis, after certifying to the Armed Services and Appropriations Committees of Congress that—

(a) Adequate U.S. supplies are not available to meet requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[68 FR 15627, Mar. 31, 2003]

225.7012-3 Contract clause.

Unless a waiver has been granted, use the clause at 252.225-7011, Restriction on Acquisition of Supercomputers, in solicitations and contracts for the acquisition of supercomputers.

[68 FR 15627, Mar. 31, 2003]

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225.7013 Restrictions on construction or repair of vessels in foreign shipyards.

In accordance with 10 U.S.C. 7309 and 7310—

(a) Do not award a contract to construct in a foreign shipyard—

(1) A vessel for any of the armed forces; or

(2) A major component of the hull or superstructure of a vessel for any of the armed forces; and

(b) Do not overhaul, repair, or maintain in a foreign shipyard, a naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy) homeported in the United States. This restriction does not apply to voyage repairs.

[68 FR 15627, Mar. 31, 2003, as amended at 71 FR 58537, Oct. 4, 2006]

225.7014 Restrictions on military construction.

(a) For restriction on award of military construction contracts to be performed in the United States outlying areas in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, *see* 236.273(a).

(b) For restriction on acquisition of steel for use in military construction projects, *see* 236.274.

[74 FR 2417, Jan. 15, 2009]

225.7015 Restriction on overseas architect-engineer services.

For restriction on award of architect-engineer contracts to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, *see* 236.602–70.

[68 FR 15627, Mar. 31, 2003]

225.7016 Prohibition.

In accordance with section 821 of the National Defense Authorization Act for Fiscal Year 2011, do not include in any solicitation issued before January 1, 2015, a requirement that proposals submitted pursuant to such solicitation shall include the use of fire-resistant rayon fiber.

[76 FR 32844, June 6, 2011]

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Subpart 225.71—Other Restrictions on Foreign Acquisition

SOURCE: 68 FR 15631, Mar. 31, 2003, unless otherwise noted.

225.7100 Scope of subpart.

This subpart contains foreign product restrictions that are based on policies designed to protect the defense industrial base.

225.7101 Definitions.

“Component” and “domestic manufacture,” as used in this subpart, are defined in the clause at 252.225–7025, Restriction on Acquisition of Forgings.

[74 FR 68384, Dec. 24, 2009]

225.7102 Forgings.

225.7102–1 Policy.

When acquiring the following forging items, whether as end items or components, acquire items that are of domestic manufacture to the maximum extent practicable:

Items	Categories
Ship propulsion shafts	Excludes service and landing craft shafts.
Periscope tubes	All.
Ring forgings for bull gears ...	All greater than 120 inches in diameter.

225.7102–2 Exceptions.

The policy in 225.7102–1 does not apply to acquisitions—

(a) Using simplified acquisition procedures, unless the restricted item is the end item being purchased;

(b) Overseas for overseas use; or

(c) When the quantity acquired exceeds the amount needed to maintain the U.S. defense mobilization base (provided the excess quantity is an economical purchase quantity). The requirement for domestic manufacture does not apply to the quantity above that required to maintain the base, in which case, qualifying country sources may compete.

225.7102–3 Waiver.

Upon request from a contractor, the contracting officer may waive the requirement for domestic manufacture of the items listed in 225.7102–1.

225.7102-4 Contract clause.

Use the clause at 252.225-7025, Restriction on Acquisition of Forgings, in solicitations and contracts, unless—

(a) The supplies being acquired do not contain any of the items listed in 225.7102-1; or

(b) An exception in 225.7102-2 applies. If an exception applies to only a portion of the acquisition, specify the expected portion in the solicitation and contract.

Subpart 225.72—Reporting Contract Performance Outside the United States

SOURCE: 70 FR 20839, Apr. 22, 2005, unless otherwise noted.

225.7201 Policy.

(a) 10 U.S.C. 2410g requires offerors and contractors to notify DoD of any intention to perform a DoD contract outside the United States and Canada when the contract could be performed inside the United States or Canada.

(b) DoD requires contractors to report the volume, type, and nature of contract performance outside the United States.

225.7202 Exception.

This subpart does not apply to contracts for commercial items, construction, ores, natural gas, utilities, petroleum products and crudes, timber (logs), or subsistence.

225.7203 Contracting officer distribution of reports.

Follow the procedures at PGI 225.7203 for distribution of reports submitted with offers in accordance with the provision at 252.225-7003, Report of Intended Performance Outside the United States and Canada—Submission with Offer.

225.7204 Solicitation provision and contract clauses.

Except for acquisitions described in 225.7202—

(a) Use the provision at 252.225-7003, Report of Intended Performance Outside the United States and Canada—Submission with Offer, in solicitations with a value exceeding \$12.5 million;

(b) Use the clause at 252.225-7004, Report of Intended Performance Outside the United States and Canada—Submission after Award, in solicitations and contracts with a value exceeding \$12.5 million; and

(c) Use the clause at 252.225-7006, Quarterly Reporting of Actual Contract Performance Outside the United States, in solicitations and contracts with a value exceeding \$650,000.

[70 FR 20839, Apr. 22, 2005, as amended at 71 FR 75892, Dec. 19, 2006; 75 FR 45074, Aug. 2, 2010]

Subpart 225.73—Acquisitions for Foreign Military Sales

225.7300 Scope of subpart.

(a) This subpart contains policies and procedures for acquisitions for foreign military sales (FMS) under the Arms Export Control Act (22 U.S.C. Chapter 39). Section 22 of the Arms Export Control Act (22 U.S.C. 2762) authorizes DoD to enter into contracts for resale to foreign countries or international organizations.

(b) This subpart does not apply to—

(1) FMS made from inventories or stocks;

(2) Acquisitions for replenishment of inventories or stocks; or

(3) Acquisitions made under DoD cooperative logistic supply support arrangements.

[63 FR 43889, Aug. 17, 1998]

225.7301 General.

(a) The U.S. Government sells defense articles and services to foreign governments or international organizations through FMS agreements. The agreement is documented in a Letter of Offer and Acceptance (LOA) (see DoD 5105.38-M, Security Assistance Management Manual).

(b) Conduct FMS acquisitions under the same acquisition and contract management procedures used for other defense acquisitions.

(c) Follow the additional procedures at PGI 225.7301(c) for preparation of solicitations and contracts that include FMS requirements.

(d) See 229.170 for policy on contracts financed under U.S. assistance programs that involve payment of foreign

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country value added taxes or customs duties.

[70 FR 73155, Dec. 9, 2005]

225.7302 Guidance.

For guidance on the role of the contracting officer in FMS programs that will require an acquisition, see PGI 225.7302.

[70 FR 73155, Dec. 9, 2005]

225.7303 Pricing acquisitions for FMS.

(a) Price FMS contracts using the same principles used in pricing other defense contracts. However, application of the pricing principles in FAR parts 15 and 31 to an FMS contract may result in prices that differ from other defense contract prices for the same item due to the considerations in this section.

(b) If the foreign government has conducted a competition resulting in adequate price competition (see FAR 15.403-1(b)(1)), the contracting officer shall not require the submission of cost or pricing data. The contracting officer should consult with the foreign government through security assistance personnel to determine if adequate price competition has occurred.

[64 FR 49683, Sept. 14, 1999, as amended at 68 FR 15632, Mar. 31, 2003]

225.7303-1 Contractor sales to other foreign customers.

If the contractor has made sales of the item required for the foreign military sale to foreign customers under comparable conditions, including quantity and delivery, price the FMS contract in accordance with FAR part 15.

225.7303-2 Cost of doing business with a foreign government or an international organization.

(a) In pricing FMS contracts where non-U.S. Government prices as described in 225.7303-1 do not exist, except as provided in 225.7303-5, recognize the reasonable and allocable costs of doing business with a foreign government or international organization, even though such costs might not be recognized in the same amounts in pricing other defense contracts. Examples of such costs include, but are not limited to, the following:

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(1) Selling expenses (not otherwise limited by FAR Part 31), such as—

(i) Maintaining international sales and service organizations;

(ii) Sales commissions and fees in accordance with FAR Subpart 3.4;

(iii) Sales promotions, demonstrations, and related travel for sales to foreign governments. Section 126.8 of the International Traffic in Arms Regulations (22 CFR 126.8) may require Government approval for these costs to be allowable, in which case the appropriate Government approval shall be obtained; and

(iv) Configuration studies and related technical services undertaken as a direct selling effort to a foreign country.

(2) Product support and post-delivery service expenses, such as—

(i) Operations or maintenance training, training or tactics films, manuals, or other related data; and

(ii) Technical field services provided in a foreign country related to accident investigations, weapon system problems, or operations/tactics enhancement, and related travel to foreign countries.

(3) Offset costs (also see 225.7306).

(i) A U.S. defense contractor may recover all costs incurred for offset agreements with a foreign government or international organization if the LOA is financed wholly with customer cash or repayable foreign military finance credits.

(ii) The U.S. Government assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs.

(4) Costs that are the subject of advance agreement under the appropriate provisions of FAR part 31; or where the advance understanding places a limit on the amounts of cost that will be recognized as allowable in defense contract pricing, and the agreement contemplated that it will apply only to DoD contracts for the U.S. Government's own requirement (as distinguished from contracts for FMS).

(b) Costs not allowable under FAR Part 31 are not allowable in pricing FMS contracts, except as noted in paragraphs (c) and (e) of this subsection.

(c) The limitations for major contractors on independent research and

development and bid and proposal (IR&D/B&P) costs for projects that are of potential interest to DoD, in 231.205-18(c)(iii), do not apply to FMS contracts, except as provided in 225.7303-5. The allowability of IR&D/B&P costs on contracts for FMS not wholly paid for from funds made available on a non-repayable basis is limited to the contractor's allocable share of the contractor's total IR&D/B&P expenditures. In pricing contracts for such FMS—

(1) Use the best estimate of reasonable costs in forward pricing; and

(2) Use actual expenditures, to the extent that they are reasonable, in determining final cost.

(d) Under paragraph (e)(1)(A) of Section 21 of the Arms Export Control Act (22 U.S.C. 2761), the United States must charge for administrative services to recover the estimated cost of administration of sales made under the Army Export Control Act.

(e) The limitations in 231.205-1 on allowability of costs associated with leasing Government equipment do not apply to FMS contracts.

[56 FR 36367, July 31, 1991, as amended at 56 FR 67216, Dec. 30, 1991; 57 FR 42631, Sept. 15, 1992; 57 FR 53600, Nov. 12, 1992; 59 FR 50511, Oct. 4, 1994; 61 FR 7744, Feb. 29, 1996; 61 FR 18987, Apr. 30, 1996; 63 FR 43889, Aug. 17, 1998; 64 FR 8729, Feb. 23, 1999; 64 FR 49684, Sept. 14, 1999; 68 FR 15632, Mar. 31, 2003; 70 FR 73155, Dec. 9, 2005; 74 FR 68382, Dec. 24, 2009]

225.7303-3 Government-to-government agreements.

If a government-to-government agreement between the United States and a foreign government for the sale, coproduction, or cooperative logistic support of a specifically defined weapon system, major end item, or support item, contains language in conflict with the provisions of this section, the language of the government-to-government agreement prevails.

225.7303-4 Contingent fees.

(a) Except as provided in paragraph (b) of this subsection, contingent fees are generally allowable under DoD contracts, provided—

(1) The fees are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the prospective contractor

for the purpose of securing business (see FAR Part 31 and FAR Subpart 3.4); and

(2) The contracting officer determines that the fees are fair and reasonable.

(b)(1) Under DoD 5105.38-M, LOAs for requirements for the governments of Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Turkey, Thailand, or Venezuela (Air Force) shall provide that all U.S. Government contracts resulting from the LOAs prohibit the reimbursement of contingent fees as an allowable cost under the contract, unless the contractor identifies the payments and the foreign customer approves the payments in writing before contract award (see 225.7307(a)).

(2) For FMS to countries not listed in paragraph (b)(1) of this subsection, contingent fees exceeding \$50,000 per FMS case are unallowable under DoD contracts, unless the contractor identifies the payment and the foreign customer approves the payment in writing before contract award.

[68 FR 15633, Mar. 31, 2003, as amended at 70 FR 73155, Dec. 9, 2005]

225.7303-5 Acquisitions wholly paid for from nonrepayable funds.

(a) In accordance with 22 U.S.C. 2762(d), price FMS wholly paid for from funds made available on a nonrepayable basis on the same costing basis with regard to profit, overhead, IR&D/B&P, and other costing elements as is applicable to acquisitions of like items purchased by DoD for its own use.

(b) Direct costs associated with meeting a foreign customer's additional or unique requirements are allowable under such contracts. Indirect burden rates applicable to such direct costs are permitted at the same rates applicable to acquisitions of like items purchased by DoD for its own use.

(c) A U.S. defense contractor may not recover costs incurred for offset agreements with a foreign government or international organization if the LOA

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is financed with funds made available on a nonrepayable basis.

[61 FR 18988, Apr. 30, 1996; 61 FR 49531, Sept. 20, 1996, as amended at 63 FR 43890, Aug. 17, 1998; 64 FR 49684, Sept. 14, 1999; 68 FR 15633, Mar. 31, 2003]

225.7304 FMS customer involvement.

(a) FMS customers may request that a defense article or defense service be obtained from a particular contractor. In such cases, FAR 6.302-4 provides authority to contract without full and open competition. The FMS customer may also request that a subcontract be placed with a particular firm. The contracting officer shall honor such requests from the FMS customer only if the LOA or other written direction sufficiently fulfills the requirements of FAR Subpart 6.3.

(b) FMS customers should be encouraged to participate with U.S. Government acquisition personnel in discussions with industry to—

- (1) Develop technical specifications;
- (2) Establish delivery schedules;
- (3) Identify any special warranty provisions or other requirements unique to the FMS customer; and
- (4) Review prices of varying alternatives, quantities, and options needed to make price-performance tradeoffs.

(c) Do not disclose to the FMS customer any data, including cost or pricing data, that is contractor proprietary unless the contractor authorizes its release.

(d) Except as provided in paragraph (e)(3) of this section, the degree of FMS customer participation in contract negotiations is left to the discretion of the contracting officer after consultation with the contractor. The contracting officer shall provide an explanation to the FMS customer if its participation in negotiations will be limited. Factors that may limit FMS customer participation include situations where—

- (1) The contract includes requirements for more than one FMS customer;
 - (2) The contract includes unique U.S. requirements; or
 - (3) Contractor proprietary data is a subject of negotiations.
- (e) Do not allow representatives of the FMS customer to—

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(1) Direct the exclusion of certain firms from the solicitation process (they may suggest the inclusion of certain firms);

(2) Interfere with a contractor's placement of subcontracts; or

(3) Observe or participate in negotiations between the U.S. Government and the contractor involving cost or pricing data, unless a deviation is granted in accordance with Subpart 201.4.

(f) Do not accept directions from the FMS customer on source selection decisions or contract terms (except that, upon timely notice, the contracting officer may attempt to obtain any special contract provisions, warranties, or other unique requirements requested by the FMS customer).

(g) Do not honor any requests by the FMS customer to reject any bid or proposal.

(h) If an FMS customer requests additional information concerning FMS contract prices, the contracting officer shall, after consultation with the contractor, provide sufficient information to demonstrate the reasonableness of the price and reasonable responses to relevant questions concerning contract price. This information—

(1) May include tailored responses, top-level pricing summaries, historical prices, or an explanation of any significant differences between the actual contract price and the estimated contract price included in the initial LOA; and

(2) May be provided orally, in writing, or by any other method acceptable to the contracting officer.

[67 FR 70325, Nov. 22, 2002]

225.7305 Limitation of liability.

Advise the contractor when the foreign customer will assume the risk for loss or damage under the appropriate limitation of liability clause(s) (see FAR Subpart 46.8). Consider the costs of necessary insurance, if any, obtained by the contractor to cover the risk of loss or damage in establishing the FMS contract price.

[56 FR 36367, July 31, 1991, as amended at 68 FR 15633, Mar. 31, 2003]

225.7306 Offset arrangements.

In accordance with the Presidential policy statement of April 16, 1990, DoD does not encourage, enter into, or commit U.S. firms to FMS offset arrangements. The decision whether to engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved. (Also see 225.7303-2(a)(3).)

[70 FR 73155, Dec. 9, 2005]

225.7307 Contract clauses.

(a) Use the clause at 252.225-7027, Restriction on Contingent Fees for Foreign Military Sales, in solicitations and contracts for FMS. Insert in paragraph (b)(1) of the clause the name(s) of any foreign country customer(s) listed in 225.7303-4(b).

(b) Use the clause at 252.225-7028, Exclusionary Policies and Practices of Foreign Governments, in solicitations and contracts for the purchase of supplies and services for international military education training and FMS.

[68 FR 15633, Mar. 31, 2003. Redesignated at 70 FR 73155, Dec. 9, 2005]

Subpart 225.74—Defense Contractors Outside the United States

SOURCE: 70 FR 23801, May 5, 2005, unless otherwise noted.

225.7401 Contracts requiring performance or delivery in a foreign country.

(a) If an acquisition requires performance of work in a foreign country by contractor personnel other than host country personnel, or delivery of items to a Unified Combatant Command designated operational area, follow the procedures at PGI 225.7401(a).

(b) For work performed in Germany, eligibility for logistics support or base privileges of contractor employees is governed by U.S.-German bilateral agreements. Follow the procedures in Army in Europe Regulation 715-9, available at <http://www.per.hqusareur.army.mil/cpd/docper/default.htm>. Follow the procedures in Army in Europe Regulation 715-9, available at <http://www.per.hqusareur.army.mil/cpd/docper/GermanyDefault.aspx>.

www.per.hqusareur.army.mil/cpd/docper/GermanyDefault.aspx.

(c) For work performed in Japan or Korea, see PGI 225.7401(c) for information on bilateral agreements and policy relating to contractor employees in Japan or Korea.

[70 FR 23801, May 5, 2005, as amended at 71 FR 39009, July 11, 2006; 72 FR 14239, Mar. 27, 2007]

225.7402 Contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.

For additional information on contractor personnel authorized to accompany the U.S. Armed Forces, see PGI 225.7402.

[73 FR 16774, Mar. 31, 2008]

225.7402-1 Scope.

(a) This section applies to contracts that involve contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States in—

- (1) Contingency operations;
- (2) Humanitarian or peacekeeping operations; or
- (3) Other military operations or military exercises, when designated by the combatant commander.

(b) Any of the types of operations listed in paragraph (a) of this subsection may include stability operations such as—

- (1) Establishment or maintenance of a safe and secure environment; or
- (2) Provision of emergency infrastructure reconstruction, humanitarian relief, or essential governmental services (until feasible to transition to local government).

[73 FR 16774, Mar. 31, 2008]

225.7402-2 Definition.

See PGI 225.7402-2 for additional information on designated operational areas.

[73 FR 16774, Mar. 31, 2008]

225.7402-3 Government support.

(a) Government support that may be authorized or required for contractor personnel performing in a designated operational area may include, but is

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not limited to, the types of support listed in PGI 225.7402-3(a).

(b) The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines in coordination with the combatant commander that—

(1) Such Government support is available and is needed to ensure continuation of essential contractor services; and

(2) The contractor cannot obtain adequate support from other sources at a reasonable cost.

(c) The contracting officer shall specify in the solicitation and contract—

(1) Valid terms, approved by the combatant commander, that specify the responsible party, if a party other than the combatant commander is responsible for providing protection to the contractor personnel performing in the designated operational area as specified in 225.7402-1;

(2) If medical or dental care is authorized beyond the standard specified in paragraph (c)(2)(i) of the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States; and

(3) Any other Government support to be provided, and whether this support will be provided on a reimbursable basis, citing the authority for the reimbursement.

(d) The contracting officer shall provide direction to the contractor, if the contractor is required to reimburse the Government for medical treatment or transportation of contractor personnel to a selected civilian facility in accordance with paragraph (c)(2)(ii) of the clause at 252.225-7040.

(e) Contractor personnel must have a Synchronized Predeployment and Operational Tracker (SPOT)-generated letter of authorization (LOA) signed by the contracting officer in order to process through a deployment center or to travel to, from, or within the designated operational area. The LOA also will identify any additional authorizations, privileges, or Government support that the contractor personnel are entitled to under the contract. For a

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sample LOA, see the Web site provided at PGI 225.7402-5(a)(iv).

[73 FR 16774, Mar. 31, 2008, as amended at 76 FR 36884, June 23, 2011]

225.7402-4 Law of war training.

(a) *Basic training.* Basic law of war training is required for all contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States. The basic training normally will be provided through a military-run training center. The contracting officer may authorize the use of an alternate basic training source, provided the servicing DoD legal advisor concurs with the course content. An example of an alternate source of basic training is the Web-based training provided by the Defense Acquisition University at <https://acc.dau.mil/CommunityBrowser.aspx?id=18014&lang=en-US>.

(b) *Advanced law of war training.* (1) The types of personnel that must obtain advanced law of war training include the following:

(i) Private security contractors.

(ii) Security guards in or near areas of military operations.

(iii) Interrogators, linguists, interpreters, guards, report writers, information technology technicians, or others who will come into contact with enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, or criminals who are captured, transferred, confined, or detained during or in the aftermath of hostilities.

(iv) Other personnel when deemed necessary by the contracting officer.

(2) If contractor personnel will be required to obtain advanced law of war training, the solicitation and contract shall specify—

(i) The types of personnel subject to advanced law of war training requirements;

(ii) Whether the training will be provided by the Government or the contractor;

(iii) If the training will be provided by the Government, the source of the training; and

(iv) If the training will be provided by the contractor, a requirement for coordination of the content with the servicing DoD legal advisor to ensure

that training content is commensurate with the duties and responsibilities of the personnel to be trained.

[74 FR 2420, Jan. 15, 2009]

225.7402-5 Contract clauses.

(a) Use the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, instead of the clause at FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, in solicitations and contracts that authorize contractor personnel to accompany U.S. Armed Forces deployed outside the United States in—

- (1) Contingency operations;
- (2) Humanitarian or peacekeeping operations; or
- (3) Other military operations or military exercises, when designated by the combatant commander.

(b) For additional guidance on clauses to consider when using the clause at 252.225-7040, see PGI 225.7402-5(b).

[73 FR 16774, Mar. 31, 2008. Redesignated at 74 FR 2420, Jan. 15, 2009. 76 FR 36884, June 23, 2011]

225.7403 Antiterrorism/force protection.

225.7403-1 General.

Information and guidance pertaining to DoD antiterrorism/force protection policy for contracts that require performance or travel outside the United States can be obtained from the offices listed in PGI 225.7403-1.

225.7403-2 Contract clause.

Use the clause at 252.225-7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that require performance or travel outside the United States, except for contracts with—

- (a) Foreign governments;
- (b) Representatives of foreign governments; or
- (c) Foreign corporations wholly owned by foreign governments.

225.7404 Contract administration in support of contingency operations.

For additional guidance on contract administration considerations when supporting contingency operations, see PGI 225.7404.

[76 FR 27274, May 11, 2011]

Subpart 225.75—Balance of Payments Program

SOURCE: 67 FR 20694, Apr. 26, 2002, unless otherwise noted.

225.7500 Scope of subpart.

This subpart provides policies and procedures implementing the Balance of Payments Program. It applies to contracts for the acquisition of—

- (a) Supplies for use outside the United States; and
- (b) Construction to be performed outside the United States.

225.7501 Policy.

Acquire only domestic end products for use outside the United States, and use only domestic construction material for construction to be performed outside the United States, including end products and construction material for foreign military sales, unless—

- (a) Before issuing the solicitation—
 - (1) The estimated cost of the acquisition or the value of a particular construction material is at or below the simplified acquisition threshold;
 - (2) The end product or particular construction material is—
 - (i) Listed in FAR 25.104 or 225.104(a)(iii);
 - (ii) A petroleum product;
 - (iii) A spare part for foreign-manufactured vehicles, equipment, machinery, or systems, provided the acquisition is restricted to the original manufacturer or its supplier;
 - (iv) An industrial gas;
 - (v) A brand drug specified by the Defense Medical Materiel Board; or
 - (vi) Information technology that is a commercial item, using fiscal year 2004 or subsequent funds (Section 535 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199), and the same provision in subsequent appropriations acts);

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(3) The acquisition is covered by the World Trade Organization Government Procurement Agreement;

(4) The acquisition of foreign end products or construction material is required by a treaty or executive agreement between governments;

(5) Use of a procedure specified in 225.7703-1(a) is authorized for an acquisition in support of operations in Iraq or Afghanistan;

(6) The end product is acquired for commissary resale; or

(7) The contracting officer determines that a requirement can best be filled by a foreign end product or construction material, including determinations that—

(i) A subsistence product is perishable and delivery from the United States would significantly impair the quality at the point of consumption;

(ii) An end product or construction material, by its nature or as a practical matter, can best be acquired in the geographic area concerned, e.g., ice or books; or bulk material, such as sand, gravel, or other soil material, stone, concrete masonry units, or fired brick;

(iii) A particular domestic construction material is not available;

(iv) The cost of domestic construction material would exceed the cost of foreign construction material by more than 50 percent, calculated on the basis of—

(A) A particular construction material; or

(B) The comparative cost of application of the Balance of Payments Program to the total acquisition; or

(v) Use of a particular domestic construction material is impracticable;

(b) After receipt of offers—

(1) The evaluated low offer (see Subpart 225.5) is an offer of an end product that—

(i) Is a qualifying country end product;

(ii) Is an eligible product; or

(iii) If the acquisition is in support of operations in Afghanistan, a South Caucasus/Central and South Asian state end product listed in 225.401-70 (see 225.7704-2); or

(iv) Is a nonqualifying country end product, but application of the Balance of Payments Program evaluation fac-

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tor would not result in award on a domestic offer; or

(2) The construction material is an eligible product or, if the acquisition is in support of operations in Afghanistan, the construction material is a South Caucasus/Central and South Asian state construction material (see 225.7704-2); or

(c) At any time during the acquisition process, the head of the agency determines that it is not in the public interest to apply the restrictions of the Balance of Payments Program to the end product or construction material.

[67 FR 20694, Apr. 26, 2002, as amended at 67 FR 77939, Dec. 20, 2002; 69 FR 1928, Jan. 13, 2004; 70 FR 2363, Jan. 13, 2005; 70 FR 73155, Dec. 9, 2005; 71 FR 58540, Oct. 4, 2006; 73 FR 53153, Sept. 15, 2008; 75 FR 81917, Dec. 29, 2010]

225.7502 Procedures.

If the Balance of Payments Program applies to the acquisition, follow the procedures at PGI 225.7502.

[71 FR 62566, Oct. 26, 2006]

225.7503 Contract clauses.

Unless the entire acquisition is exempt from the Balance of Payments Program—

(a)(1) Use the clause at 252.225-7044, Balance of Payments Program—Construction Material, in solicitations and contracts for construction to be performed outside the United States with a value greater than the simplified acquisition threshold but less than \$7,804,000.

(2) Use the clause with its Alternate I if the acquisition is in support of operations in Afghanistan.

(b)(1) Use the clause at 252.225-7045, Balance of Payments Program—Construction Material Under Trade Agreements, in solicitations and contracts for construction to be performed outside the United States with a value of \$7,804,000 or more.

(2) For acquisitions with a value of \$7,804,000 or more, but less than \$9,110,318, use the clause with its Alternate I, unless the acquisition is in support of operations in Afghanistan.

(3) If the acquisition is for construction with a value of \$9,110,318 or more and is in support of operations in Afghanistan, use the clause with its Alternate II.

(4) If the acquisition is for construction with a value of \$7,804,000 or more, but less than \$9,110,318, and is in support of operations in Afghanistan, use the clause with its Alternate III.

[75 FR 81918, Dec. 29, 2010, as amended at 76 FR 3536, Jan. 20, 2011]

Subpart 225.76—Secondary Arab Boycott of Israel

SOURCE: 71 FR 39006, July 11, 2006, unless otherwise noted.

225.7601 Restriction.

In accordance with 10 U.S.C. 2410i, do not enter into a contract with a foreign entity unless it has certified that it does not comply with the secondary Arab boycott of Israel.

225.7602 Procedures.

For contracts awarded to the Canadian Commercial Corporation (CCC), the CCC will submit a certification from its proposed subcontractor with the other required precontractual information (see 225.870).

225.7603 Exceptions.

This restriction does not apply to—

- (a) Purchases at or below the simplified acquisition threshold;
- (b) Contracts for consumable supplies, provisions, or services for the support of United States forces or of allied forces in a foreign country; or
- (c) Contracts pertaining to the use of any equipment, technology, data, or services for intelligence or classified purposes, or to the acquisition or lease thereof, in the interest of national security.

225.7604 Waivers.

The Secretary of Defense may waive this restriction on the basis of national security interests. To request a waiver, follow the procedures at PGI 225.7604.

[71 FR 62566, Oct. 26, 2006]

225.7605 Solicitation provision.

Unless an exception applies or a waiver has been granted in accordance with 225.7604, use the provision at 252.225-7031, Secondary Arab Boycott of Israel, in all solicitations.

Subpart 225.77—Acquisitions in Support of Operations in Iraq or Afghanistan

SOURCE: 73 FR 53153, Sept. 15, 2008, unless otherwise noted.

225.7700 Scope.

This subpart implements—

- (a) Section 886 and section 892 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181); and
- (b) The determinations by the Deputy Secretary of Defense regarding participation of the countries of the South Caucasus or Central and South Asia in acquisitions in support of operations in Afghanistan.

[75 FR 81918, Dec. 29, 2010]

225.7701 Definitions.

As used in this subpart—

Product from Iraq or Afghanistan means a product that is mined, produced, or manufactured in Iraq or Afghanistan.

Service from Iraq or Afghanistan means a service (including construction) that is performed in Iraq or Afghanistan predominantly by citizens or permanent resident aliens of Iraq or Afghanistan.

Small arms means pistols and other weapons less than 0.50 caliber.

Source from Iraq or Afghanistan means a source that—

- (1) Is located in Iraq or Afghanistan; and
- (2) Offers products or services from Iraq or Afghanistan.

[73 FR 53153, Sept. 15, 2008, as amended at 75 FR 18039, Apr. 8, 2010]

225.7702 Acquisition of small arms.

- (a) Except as provided in paragraph (b) of this section, when acquiring small arms for assistance to the Army of Iraq, the Army of Afghanistan, the Iraqi Police Forces, the Afghani Police Forces, or other Iraqi or Afghani security organizations—

(1) Use full and open competition to the maximum extent practicable, consistent with the provisions of 10 U.S.C. 2304;

(2) If use of other than full and open competition is justified in accordance with FAR Subpart 6.3, ensure that—

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(i) No responsible U.S. manufacturer is excluded from competing for the acquisition; and

(ii) Products manufactured in the United States are not excluded from the competition; and

(3) If the exception at FAR 6.302-2 (unusual and compelling urgency) applies, do not exclude responsible U.S. manufacturers or products manufactured in the United States from the competition for the purpose of administrative expediency. However, such an offer may be rejected if it does not meet delivery schedule requirements.

(b) Paragraph (a)(2) of this section does not apply when—

(1) The exception at FAR 6.302-1 (only one or a limited number of responsible sources) applies, and the only responsible source or sources are not U.S. manufacturers or are not offering products manufactured in the United States; or

(2) The exception at FAR 6.302-4 (international agreement) applies, and United States manufacturers or products manufactured in the United States are not the source(s) specified in the written directions of the foreign government reimbursing the agency for the cost of the acquisition of the property or services for such government.

225.7703 Acquisition of products or services other than small arms.

225.7703-1 Acquisition procedures.

(a) Subject to the requirements of 225.7703-2, a product or service (including construction), other than small arms, in support of operations in Iraq or Afghanistan, may be acquired by—

(1) Providing a preference for products or services from Iraq or Afghanistan in accordance with the evaluation procedures at 225.7703-3;

(2) Limiting competition to products or services from Iraq or Afghanistan; or

(3) Using procedures other than competitive procedures to award a contract to a particular source or sources from Iraq or Afghanistan. When other than competitive procedures are used, the contracting officer shall document the contract file with the rationale for selecting the particular source(s).

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(b) For acquisitions conducted using a procedure specified in paragraph (a) of this subsection, the justification and approval addressed in FAR Subpart 6.3 is not required.

225.7703-2 Determination requirements.

Before use of a procedure specified in 225.7703-1(a), a written determination must be prepared and executed as follows:

(a) For products or services to be used only by the military forces, police, or other security personnel of Iraq or Afghanistan, the contracting officer shall—

(1) Determine in writing that the product or service is to be used only by the military forces, police, or other security personnel of Iraq or Afghanistan; and

(2) Include the written determination in the contract file.

(b) For products or services not limited to use by the military forces, police, or other security personnel of Iraq or Afghanistan, the following requirements apply:

(1) The appropriate official specified in paragraph (b)(2) of this subsection must determine in writing that it is in the national security interest of the United States to use a procedure specified in 225.7703-1(a), because—

(i) The procedure is necessary to provide a stable source of jobs in Iraq or Afghanistan; and

(ii) Use of the procedure will not adversely affect—

(A) Operations in Iraq or Afghanistan (including security, transition, reconstruction, and humanitarian relief activities); or

(B) The U.S. industrial base. The authorizing official generally may presume that there will not be an adverse effect on the U.S. industrial base. However, when in doubt, the authorizing official should coordinate with the applicable subject matter expert specified in PGI 225.7703-2(b).

(2) Determinations may be made for an individual acquisition or a class of acquisitions meeting the criteria in paragraph (b)(1) of this subsection as follows:

(i) The head of the contacting activity is authorized to make a determination that applies to an individual acquisition with a value of less than \$85.5 million.

(ii) The Director, Defense Procurement and Acquisition Policy, and the following officials, without power of re-delegation, are authorized to make a determination that applies to an individual acquisition with a value of \$85.5 million or more or to a class of acquisitions:

- (A) Defense Logistics Agency Component Acquisition Executive.
- (B) Army Acquisition Executive.
- (C) Navy Acquisition Executive.
- (D) Air Force Acquisition Executive.
- (E) Commander of the Joint Contracting Command—Iraq/Afghanistan (JCC-I/A).

(3) The contracting officer—

(i) Shall include the applicable written determination in the contract file; and

(ii) Shall ensure that each contract action taken pursuant to the authority of a class determination is within the scope of the class determination, and shall document the contract file for each action accordingly.

(c) See PGI 225.7703-2(c) for formats for use in preparation of the determinations required by this subsection.

[73 FR 53153, Sept. 15, 2008, as amended at 75 FR 18039, Apr. 8, 2010; 75 FR 45074, Aug. 2, 2010]

225.7703-3 Evaluating offers.

(a) Evaluate offers submitted in response to solicitations that include the provision at 252.225-7023, Preference for Products or Services from Iraq or Afghanistan, as follows:

(1) If the low offer is an offer of a product or service from Iraq or Afghanistan, award on that offer.

(2) If there are no offers of a product or service from Iraq or Afghanistan, award on the low offer.

(3) Otherwise, apply the evaluation factor specified in the solicitation to the low offer.

(i) If the price of the low offer of a product or service from Iraq or Afghanistan is less than the evaluated price of the low offer, award on the low offer of a product or service from Iraq or Afghanistan.

(ii) If the evaluated price of the low offer remains less than the low offer of a product or service from Iraq or Afghanistan, award on the low offer.

(b) If the provision at 252.225-7023 is modified to provide a preference exclusively for products or services from Iraq or Afghanistan, also modify the evaluation procedures in paragraph (a) of this subsection to remove “or Afghanistan” or “Iraq or”, respectively, wherever the phrase appears.

225.7703-4 Reporting requirement.

The following organizations shall submit periodic reports to the Deputy Director, Contingency Contracting & Acquisition Policy, Defense Procurement and Acquisition Policy, in accordance with PGI 225.7703-4, to address the organization’s use of the procedures authorized by this section:

(a) The Joint Contracting Command (Iraq/Afghanistan).

(b) The Department of the Army, except for contract actions reported by the Joint Contracting Command.

(c) The Department of the Navy.

(d) The Department of the Air Force.

(e) The Defense Logistics Agency.

(f) The other defense agencies and other DoD components that execute reportable contract actions.

[73 FR 53153, Sept. 15, 2008, as amended at 75 FR 18039, Apr. 8, 2010]

225.7703-5 Solicitation provisions and contract clauses.

(a) Use the provision at 252.225-7023, Preference for Products or Services from Iraq or Afghanistan, in solicitations that provide a preference for products or services from Iraq or Afghanistan in accordance with 225.7703-1(a)(1). The contracting officer—

(1) May modify the provision to provide a preference exclusively for products or services from Iraq or exclusively for products or services from Afghanistan by removing “or Afghanistan” or “Iraq or”, respectively, wherever the phrase appears in the provision. If this provision is so modified, the clause at 252.225-7024 shall be modified accordingly; and

(2) May modify the 50 percent evaluation factor in accordance with contracting office procedures.

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(b) Use the clause at 252.225-7024, Requirement for Products or Services from Iraq or Afghanistan, in solicitations that include the provision at 252.225-7023, Preference for Products or Services from Iraq or Afghanistan, and in the resulting contract. If the provision at 252.225-7023 has been modified to provide a preference exclusively for Iraq or exclusively for Afghanistan, in accordance with paragraph (a)(1) of this subsection, the clause at 252.225-7024 shall be modified accordingly.

(c)(1) Use the clause at 252.225-7026, Acquisition Restricted to Products or Services from Iraq or Afghanistan, in solicitations and contracts that—

(i) Are restricted to the acquisition of products or services from Iraq or Afghanistan in accordance with 225.7703-1(a)(2); or

(ii) Will be directed to a particular source or sources from Iraq or Afghanistan in accordance with 225.7703-1(a)(3).

(2) The contracting officer may modify the clause to restrict the acquisition to products or services from Iraq, or to restrict the acquisition to products or services from Afghanistan, by removing “or Afghanistan” or “Iraq or”, respectively, wherever the phrase appears in the clause.

(d) When the Trade Agreements Act applies to the acquisition, use the appropriate clause and provision as prescribed at 225.1101 (5), (6), or (7).

(e) Do not use any of the following provisions or clauses in solicitations or contracts that include the provision at 252.225-7023, the clause at 252.225-7024, or the clause at 252.225-7026:

(1) 252.225-7000, Buy American Act—Balance of Payments Program Certificate.

(2) 252.225-7001, Buy American Act and Balance of Payments Program.

(3) 252.225-7002, Qualifying Country Sources as Subcontractors.

(4) 252.225-7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

(5) 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program.

(6) 252.225-7044, Balance of Payments Program—Construction Material.

(7) 252.225-7045, Balance of Payments Program—Construction Material Under Trade Agreements.

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(f) Do not use the following clause or provision in solicitations or contracts that include the clause at 252.225-7026:

(1) 252.225-7020, Trade Agreements Certificate.

(2) 252.225-7021, Trade Agreements.

(3) 252.225-7022, Trade Agreements Certificate—Inclusion of Iraqi End Products.

[73 FR 53153, Sept. 15, 2008, as amended at 75 FR 18039, Apr. 8, 2010]

225.7704 Acquisitions of products and services from South Caucasus/Central and South Asian (SC/CASA) state in support of operations in Afghanistan.

225.7704-1 Applicability of trade agreements.

As authorized by the United States Trade Representative, the Secretary of Defense has waived the prohibition in section 302(a) of the Trade Agreements Act (see subpart 225.4) for acquisitions by DoD, and by GSA on behalf of DoD, of products and services from SC/CASA states in direct support of operations in Afghanistan.

[75 FR 81918, Dec. 29, 2010]

225.7704-2 Applicability of Balance of Payments Program.

The Deputy Secretary of Defense has determined, because of importance to national security, that it would be inconsistent with the public interest to apply the provisions of the Balance of Payments Program (see subpart 225.75) to offers of end products other than arms, ammunition, and war materials (i.e., end products listed in 225.401-70) and construction materials from the SC/CASA states that are being acquired by or on behalf of DoD in direct support of operations in Afghanistan.

[75 FR 81918, Dec. 29, 2010]

225.7704-3 Solicitation provisions and contract clauses.

Appropriate solicitation provisions and contract clauses are prescribed as alternates to the Buy American-Trade Agreements-Balance of Payments Program solicitation provisions and contract clauses prescribed at 225.1101 and 225.7503.

[75 FR 81918, Dec. 29, 2010]

Subpart 225.78—Acquisitions in Support of Geographic Combatant Command's Theater Security Cooperation Efforts

§ 225.7801 Policy.

For guidance on procurement support of the geographic combatant command's theater security cooperation efforts, see PGI 225.78.

[76 FR 27274, May 11, 2011]

PART 226—OTHER SOCIOECONOMIC PROGRAMS

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36388, July 31, 1991, unless otherwise noted.

Subpart 226.1—Indian Incentive Program

226.103 Procedures.

Follow the procedures at PGI 226.103 when submitting a request for funding of an Indian incentive.

[70 FR 73149, Dec. 9, 2005]

226.104 Contract clause.

Use the clause at 252.226-7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns, in solicitations and contracts for supplies or services exceeding \$500,000 in value.

[68 FR 56562, Oct. 1, 2003, as amended at 69 FR 55991, Sept. 17, 2004]

Subpart 226.3—Historically Black Colleges and Universities and Minority Institutions

SOURCE: 70 FR 73149, Dec. 9, 2005, unless otherwise noted.

226.370 Contracting with historically black colleges and universities and minority institutions.

226.370-1 General.

This section implements the historically black college and university (HBCU) and minority institution (MI) provisions of 10 U.S.C. 2323.

226.370-2 Definitions.

Definitions of HBCUs and MIs are in the clause at 252.226-7000, Notice of Historically Black College or University and Minority Institution Set-Aside.

226.370-3 Policy.

DoD will use outreach efforts, technical assistance programs, advance payments, HBCU/MI set-asides, and evaluation preferences to meet its contract and subcontract goals for use of HBCUs and MIs.

226.370-4 Set-aside criteria.

Set aside acquisitions for exclusive HBCU and MI participation when the acquisition is for research, studies, or services of the type normally acquired from higher educational institutions